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No. 2672

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

EXAMINER PRINTING COMPANY, a Corporation and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

VOLUME I.

(Pages 1 to 224, Inclusive.)

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Northern District of California.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY (a Corporation), and WILLIAM RANDOLPH HEARST,

Defendants.

Complaint.

The plaintiff for a cause of action against the defendants complains and alleges:

(1) That the plaintiff is an alien and was born in foreign parts, and is, and at all the times hereinafter mentioned was, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times herein mentioned, a resident and an inhabitant of the State of California, residing at Berkeley, in the County of Alameda in said State, in the northern district thereof; that plaintiff for more than fifteen years last past has been continuously and actively engaged in the practice of his profession as a civil engineer in different parts of the English-speaking world and is, and was at all the times hereinafter mentioned, so engaged in practicing his said profession in the United States of America.

(2) That the defendant, Examiner Printing Company is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of

the United States of America, upon the application of said City of San Francisco therefor, granted to said city a permit for a right of way and franchise to build, construct and maintain a dam and reservoir in the Hetch Hetchy Valley in said county and Eleanor in Tuolumne County in the State of California and also for the right of way and franchise to build, construct and maintain a dam and reservoir in the Hetch Hetchy Valley in said county and state last aforesaid, upon the condition and with the express understanding and agreement on the part of said City of San Francisco that it would develop the Lake Eleanor site to its full capacity before beginning the development of the Hetch Hetchy site and that the development of the latter would be begun only when the needs of the City and County of San Francisco and adjacent cities, which may join it in obtaining a common water supply, may require such further development, and that said permit was, and ever since has been, and now is, known as the "Garfield permit": That thereafter and on or [3] about the 25th day of February, 1910, the then Secretary of Interior of the United States of America issued and caused to be duly served upon said City of San Francisco an order to show cause why that portion of said Garfield permit granting a right of way and franchise to said City of San Francisco to build, construct and maintain said Hetch Hetchy dam and reservoir should not be revoked and cancelled and why the Hetch Hetchy Valley and reservoir site should not be eliminated from said Garfield permit that thereafter

and on the 12th day of May, 1910, the then Secretary of the Interior requested the Secretary of War to appoint a Board of Army Engineers to act as an advisory board in the determination of the questions to arise upon the hearing of said order to show cause: That thereafter and on the 27th day of May, 1910, the then Secretary of the Interior made an order granting said City of San Francisco to and including June 1, 1911, within which the said City of San Francisco should answer said order to show cause why Hetch Hetchy dam and reservoir site should not be eliminatd from said Garfield permit; that said order of continuance last aforesaid was granted upon the condition and for the purpose, as stated therein, following to wit; "Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and watershed contributary, or which may be made contributary thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonable prospective needs of said City of San Francisco and adjacent bay cities without the inclusion of the Hetch Hetchy Valley as a part of said sources of supply, and whether it is necessary to include said Hetch Hetchy Valley as a source of municipal water supply for said City and County of San Francisco [4] and bay cities.

"In granting said postponement and continuance it is understood said City and County of San Fran-

cisco will at once proceed, at its own expense and with due diligence, to secure and furnish to said Advisory Board of Army Engineers all necessary data upon which to make the determination aforesaid, and pending the hearing upon said order to show cause, no attempt shall be made by said city or any of its officers or agents to acquire, as against the United States, any other or different rights to the Hetch Hetchy Valley than it now has under said permit, and that no effort shall be made by said city to develop said Hetch Hetchy Valley site."

4. That thereafter from time to time the then Secretary of the Interior granted other and further continuances of said hearing until the final date for the submission of the case of said City of San Francisco in answer to said order to show cause was fixed for the first day of August, 1912, and that thereafter the final hearing was held before the then Secretary of the Interior in Washington in the District of Columbia on November 25th to 30th, inclusive, 1912: That there was appropriated by the Congress of the United States of America, the whole sum of $12,000 and no more, with which to pay the expenses of the said Advisory Board of Army Engineers; that it then and there became the sacred duty and solemn obligation of said City of San Francisco in good faith and with strict fidelity to furnish said Advisory Board of Army Engineers full, accurate and complete data of and concerning all sources of water supply available to said city which, together [5] with that to be drawn from the Lake Eleanor basin and watershed contributary,

or which might be made contributary thereto, would be adequate for all present and reasonable prospective needs of said City of San Francisco and adjacent bay cities and that in the months subsequent to June 30th, 1912, said City of San Francisco, at the cost of several hundred thousand dollars did furnish to said Advisory Board of Army Engineers what purported to be such data and reports, which was and is known as the "Freeman Report": That theretofore and in the month of April, 1912, the then city engineer of said city of San Francisco, acting pursuant to the letter and spirit of the terms and conditions imposed as aforesaid upon said city to furnish the data and reports aforesaid upon other sources of water supply available to said city caused a full, careful, painstaking and complete survey and report to be made by him by a skillful and competent assistant in his employ, of the sources of domestic water supply available to said city from the Mokelumne River in said State of California: That said survey and report was accompanied by numerous maps and diagrams showing the location and extent of said sources of domestic water supply and the details of the construction works by which the same could be economically developed; and said report was fully compiled and finally revised to the point that it was ready to be typed and put into permanent form to be furnished as proper data to said Advisory Board of Army Engineers; that in this condition it bore the endorsement of the then city engineer of said City of San Francisco to the effect substantially, that, during the critical period

from August, 1907, to December, 1909, there was available from Mokelumne River sources four hundred thirty-two million gallons of water daily draft to said City of San Francisco, provided all reservoirs were secured and utilized, and that these sources, under this assumption, [6] were sufficient to meet the demands of the region around the bay of San Francisco when reinformed from a full development of Lake Eleanor: That after the hearing before the then Secretary of the Interior in November, 1912, as aforesaid and on or about to wit, March 1st, 1913, the then Secretary of the Interior refused to base any official action upon the report of said Advisory Board of Army Engineers or upon the data and reports furnished by said City of San Francisco in answer to said order to show cause why the Hetch Hetchy Valley and reservoir should not be eliminated from the Garfield permit, upon the ground, among others, that the Congress of the United States of America possessed the exclusive power and jurisdiction to grant an irrevocable right of way and franchise such as was included in the Garfield permit. That thereafter and on the —— day of March, 1913, Congress of the United States of Amercia convened in Washington, in the District of Columbia, in special session and immediately thereupon the City of San Francisco sent a delegation of special agents to attend upon said session of Congress and to await upon and appear before the committee of Congress having jurisdiction of the public lands of the United States in behalf of its application for the right of way fran-

chises and special privileges and immunities necessary to be obtained in order to acquire the Hetch Hetchy dam and reservoir for and in behalf of the special interest of the City of San Francisco and of the inhabitants thereof for the uses and purposes aforesaid, and that said city of San Francisco maintained said agents and its lobby as aforesaid in the City of Washington during the balance of said year 1913 in behalf of its application for said special privileges as aforesaid; that at various times during the year, 1913, the respective congressional committees having jurisdiction of matters pertaining to the public [7] lands of the United States held public hearings upon bills introduced in Congress, having for their object the granting to said City of San Francisco the said right of way, franchises and special privileges to use the Hetch Hetchy dam and reservoir site for uses and purposes aforesaid.

5. That on or about the month of June, 1912, the plaintiff herein was employed as a consulting civil engineer to make a survey in the field and to prepare notes, maps, profiles and a report of and concerning the availability of the Mokelumne River sources in the Sierra Nevada mountains in California, aforesaid as an available cource of water supply for irrigation and hydro-electric purposes, and in the course his investigations under such employment then and there discovered that, in extent and adequacy, said sources would economically supply the City of San Francisco with at least 350,000,000 gallons of pure mountain water for domestic use per day; that thereafter and on or about the month

of June, 1913, plaintiff discovered that the said availability and adequacy of said Mokelumne sources of water supply, when used in connection with the Lake Eleanor basin and watershed, to supply all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities were and had been since 1912, intimately and accurately known to the city engineers of the City of San Francisco by and through said report prepared by the then city engineer in April, 1912, but that neither the facts contained therein nor the report itself had been furnished to said Advisory Board of Army Engineers; that acting in performance of the duty owing by civil engineers to their profession, plaintiff on or about the 14th day of June, 1913, voluntarily and upon his own initiative, but with the advise and [8] consent of his clients, advised a member of the Committee on Public Lands of the House of Representatives of the United States of America substantially to the effect as aforesaid and that, on or about the 23d day of June, 1913, plaintiff, acting from the motives and with the purposes aforesaid, voluntarily and upon his own initiative, but with the advice and consent of his clients, advised the chairman of said Public Lands Committee, as follows:

(a) "That 350 Million gallons of pure mountain water can be economically supplied to San Francisco from 430 square miles of Mokelumne River Upper Catchment, at elevation between 2200 and 10,000 feet.

(b) "That the cost of developing this supply

will be much less than that of the Hetch Hetchy project.

(c) "That this supply alone will be sufficient for San Francisco and Bay Cities' needs for next century.

(d) "That this supply combined with Spring Valley and Lake Eleanor will supply San Francisco and Bay Cities for 180 years.

(e) "That it can be developed from storage which will not conflict with any irrigation interests, or with the use, by the Nation, of the National Park of Hetch Hetchy.

(f) "That it will give the people of San Francisco as pure a mountain supply as "Hetch Hetchy —and will not involve nearly as large an initial expenditure of certain works as proposed for Hetch Hetchy, many of which will be useless for city supply for some seventy years, and upon which the rate payers of San Francisco will have to pay fixed charges amounting to several times the original cost before they come into full use. [9]

(g) "That from 90,000 to 100,000 continuous H. P. or 140,000 to 160,000 salable H. P. will be economically available for municipal purposes from the fall on the Mokelumne River proposed conduits. That the city, instead of having to supply hydro-electric power free, as they will have to do to irrigationists in the Hetch Hetchy project, would obtain from the hydro-electric power on the Mokelumne River a gross annual revenue of from $5,000,000 to $6,500,000 or sufficient to at least pay the fixed charges on the cost of installing the whole supply

as well as the purchase of the Spring Valley System."

And further represented and stated to said chairman of said committee, that said City of San Francisco has suppressed from said Board of Army Engineers a carefully considered report made by and under the direction of its then city engineer in April, 1912, wherein and whereby it was fully and accurately shown that an amount of water amounting approximately to the amount claimed as above by the plaintiff herein could be supplied to San Francisco from the Molkelumne River sources and which, combined with Lake Eleanor was sufficient for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities; that thereupon and as a result of said communications an adjourned meeting of said Committee on Public Lands of said House of Representatives was set for July 7, 1913, for the purpose of hearing and determining the facts aforesaid and to give opportunity to parties then in the City of San Francisco to appear and testify regarding the same before said committee in Washington; that thereafter one Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, against the wishes of plaintiff and his clients, appeared before said Committee on Public Lands of the House of Representatives and testified to the best of his ability concerning the facts which were within the particular [10] knowledge of plaintiff; that said Committee on Public Lands sought to discredit the testimony of the said Sullivan upon the ground of his personal interest in the said Sierra Blue Lakes Water and Power

Company, and because said company owned water rights which would have to be purchased by said City of San Francisco if it obtained its water supply from the Mokelumne sources; that thereafter and during all the rest of said special session of Congress and up to and until the date that said bill granting said right of way, franchise and special privileges to the City of San Francisco was passed by the Congress of the United States of America, it became and was the sole object of said City of San Francisco acting by and through its agents and lobbyists to discredit the statements made by and furnished to said Committee on Public Lands of said House of Representatives by the plaintiff herein by attaching the interest of said plaintiff to that of the said Sullivan; that during none of the time herein mentioned was the plaintiff in the employ of the said Sullivan or acting by or under his direction or control, nor did he have any pecuniary interest in the sale of properties of the Sierra Blue Lakes Water and Power Company, located on the Mokelumne River, to said City of San Francisco, and that he, the plaintiff, was actuated in furnishing the statements and reports to said Committee on Public Lands concerning the availability and adequacy of said Mokelumne sources of water supply for said City of San Francisco from the pure motives and with the honest purposes aforesaid and no other; that no fact or circumstances were proved or offered to be proved before any of the committees of Congress which would show otherwise, or which would particularly show that plaintiff, alone, or in combination or conspiracy with

the said Sullivan or any other person pretended to have an opposition water supply to sell to the City of [11] San Francisco, or that plaintiff alone, or in combination or conspiracy with the said Sullivan or any one else, was engaged in an attempt to perpetrate a gross fraud or any fraud upon the Government of the United States, or the City of San Francisco or upon any other person or persons, interest or interests, corporation or corporations public or private.

6. That on or about September 3d, 1913, the said Committee on Public Lands of the House of Representatives having favorably reported the bill designated "bill H. R. 7207 entitled 'A Bill Granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes' " being a bill for an act of Congress, granting said City of San Francisco said right of way, franchises and special privileges to construct, maintain and operate said dam and reservoir in said Hetch Hetchy Valley for domestic supply and hydro-electric power purposes as aforesaid, the same was passed by the House of Representatives aforesaid; and thereafter and on the —— day of December, 1913, said bill came up for consideration and debate in the Senate of the United States under a rule requiring said debate to be closed and a vote to be taken thereon on the —— day of December, 1913,

that upon receiving notice of the time said bill would be up for debate in said Senate of the United States the defendant the Examiner Printing Company in the special interest of said City of San Francisco and for the purpose of increasing the power, prestige and influence of the daily newspaper printed and published by it in said city—The San Francisco Examiner—and to increase and augment the value of the good will of said newspaper and of [12] said Examiner Printing Company, and the defendant, William Randolph Hearst, in the special interest of the City of San Francisco for the purpose of augmenting his own individual personal and political power and influence in the different parts of the United States of America as aforesaid and in the interest of further increasing the value of the goodwill of his newspaper interests in said City of San Francisco conceived and laid out the plan of issuing a special Washington edition of San Francisco Examiner by printing, publishing and circulating in the City of Washington, in the District of Columbia, and elsewhere in the United States of America and throughout the world, an issue of said newspaper to be known as The San Francisco Examiner which should contain no other subject matter, news, dispatches, special articles or other printed reading matter than that pertaining and favorable to and which tended to promote the passage by the Senate of the United States of America of said bill H. R. No. 7207; that the said special Washington edition of the San Francisco Examiner was thereupon and on December 2, 1913, printed, published and issued

in the City of Washington in the District of Columbia and consisted of sixteen pages entirely devoted to the favorable consideration of the bill known as bill H. R. No. 7207; that plaintiff is informed and believes and therefore alleges that the said Washington edition of said San Francisco Examiner was without precedent in the following and each of the following particulars, that is to say; that it was the first newspaper to be wholly, edited, printed and published under the direct personal control, management and supervision of the defendant, William Randolph Hearst; that it is the only newspaper ever issued at the capital of the United States of America for the express and only purpose of directly influencing the action of Congress of the United States in favor of the passage of a bill granting rights of [13] way, franchises and special privileges and immunities belonging to all of the people of the United States in behalf of a special interest while the debate upon the passage of said bill was in progress; that it was the first and only paper, issued under such circumstances, to contain what purports to be signed statements and interviews by the Vice-president of the United States of America, and by three members of the Cabinet of the President of said United States, and by the speaker of the House of Representatives of the United States, and by a Representative in Congress and by a large number of members of the Senate of the United States expressing favorable sentiments in behalf of and endorsing the passage of such a bill at the time when said bill was under discussion in the Congress of the United States; also

that it was the only paper that was ever printed and published in the Capital of the United States of America, for the purpose and under the circumstances herein before stated, by a newspaper publisher or proprietor which did not own, print or publish, a newspaper in said capital; that plaintiff is informed and believes and therefore alleges that the reportorial and mechanical work upon said paper was done by members of the staff of other and different newspapers, owned or controlled by said defendant, William Randolph Hearst, that the San Francisco Examiner; and that, as plaintiff is informed and believes and therefore alleges, said signed interviews and statements with the officers, agents and trustees of the government of the United States was obtained by and through the personal influence of the defendant William Randolph Hearst, and of his attorneys, emissaries and agents brought to the capital of the United States from New York and Chicago and other places where the said defendant operates and conducts his newspaper [14] enterprises by the said defendant, William Randolph Hearst, and at his expense and at the expense of the defendant, Examiner Printing Company, for the purpose of obtaining said signed special articles and interviews and of editing, printing and publishing said special Washington edition of said San Francisco Examiner as aforesaid; that at and prior to the time said bill came up for debate in the Senate of the United States, considerable public attention and interest throughout the different parts of the United Sates had become centered upon the obviously great

efforts that were being made by the agents and lobbyists maintained at Washington as aforesaid by said City of San Francisco in behalf of the passage of said bill and much public criticism had been and was indulged in, between the months of June and December, 1913, by the press of the United States over and concerning the suppression from the Advisory Board of Army Engineers of the favorable report of the City Engineer of said San Francisco, prepared in April, 1912, as aforesaid, showing the availability and adequacy of the Mokelumne source of water supply for said City of San Francisco; that said suppressed report was known to the press and the public of the United States as the "Bartell Report" and the "Bartell-Manson Report" and that the fact of the suppression of said report was first made public by and through the statements and communications made by the plaintiff as aforesaid and was first publicly testified to before the Committee on Public Lands of the House of Representatives by the said Eugene Sullivan on the 7th day of July, 1913; that no reference was made in said special Washington edition of said San Francisco Examiner by said defendants, Hearst and Examiner Printing Company, to said Bartell-Manson Report or to the fact of its suppression and the concealment [15] thereof from the Advisory Board of Army Engineers by said City of San Francisco; but that on the other hand said defendants vilified personally said Eugene Sullivan and sought to discredit the testimony of said Sullivan by charging him with being a thief and by printing and publishing on the

sixth page of said special Washington edition of said San Francisco "Examiner" under the following headline in black-faced type

"THIEF WITH THE NATURE LOVERS"

the following statement also in black-faced type attributed to a congressman of the United States of America from the State of California:

"I want to state here and now that I have read this literature put out by these people (meaning the statements of the plaintiff and the said Eugene Sullivan concerning the suppression of the "Bartell-Manson Report" as aforesaid and the statement of the plaintiff and the said Sullivan that the said Mokelumne sources of water supply were reasonably available and adequate for all present and reasonably prospective needs of said City of San Francisco and the adjacent bay cities).

It has only one foundation in fact and that foundation is the letters of this man Sullivan (meaning the said Eugene J. Sullivan) whom we proved in the hearings in the House (meaning the House of Representatives) to be a thief and a man who ought to be in the penitentiary."

That by reason of all of the foregoing special and particular facts and circumstances surrounding the printing and publishing of said special Washington edition of said San Francisco Examiner said newspaper became and was an object of great interest and attention in the City of Washington and elsewhere throughout the United States and was widely circulated and read throughout all [16] of said places; that said newspaper by reason of the fact

that it contained no transient or fugitive news, but was entirely devoted to said Hetch Hetchy project possessed a permanent value and held a continuing interest which has had the effect to cause the copies thereof to be preserved by those into whose possession they came; that many copies thereof were obtained by agents and officers of said City of San Francisco and the same have been offered and put into circulation from time to time since said 2d day of December, 1912.

7. That on said 2d day of December, 1913 and at the City of Washington aforesaid the said defendants, William Randolph Hearst, as the managing editor in charge of, and the said defendant Examiner Printing Company as the proprietor and publisher of said special Washington edition of said San Francisco Examiner did print and publish in said newspaper and did thereby circulate in and throughout the said City of Washington and elsewhere throughout the United States of America and the English-speaking world at large, of and concerning the plaintiff the following defamatory and libelous statements, to wit:

"INSPIRATION OF OPPOSITION.

"During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

"But at the House hearing it had been so

thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted receiving information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston." [17]

8. That by the use and publication of said words and language, used and published by said defendants, and each of them as aforesaid, on the seventh page of said special Washington edition of said newspaper and opposite the publication of the words and language heretofore set out charging the said Eugene J. Sullivan to be "a thief" and "a man who ought to be in the penitentiary," they and each of them intended to charge and assert, and to be understood as charging and asserting, and were by the readers of said newspaper in fact understood as charging and ascertaining (1) that this plaintiff was guilty of the fraudulent, intent, purpose and design to combine and conspire with the said Eugene J. Sullivan to perpetrate a gross fraud upon the City of San Francisco by and through the sale to said city of a worthless opposition water supply and that said plaintiff did pretend to have such opposition water supply to sell to said city and that, because he pretended with said Sullivan to have such opposition water supply to sell to said city he was led to and did make gross and careless aspersions on said City of San Francisco, the Advisory Board of Army Engineers and engineers generally (meaning thereby to refer to the statements that had been made before various congressional hearings, upon the authority of plaintiff

concerning the suppression of said Bartell-Manson Report by said city of San Francisco);

(2) That this plaintiff had been proved at the hearing before the Committee on Public Lands of the House of Representatives to be guilty of combining and conspiring with said Eugene J. Sullivan to perpetrate and of perpetrating a gross fraud either upon said committee, or upon the House of Representatives, or upon Congress, or upon the City of San Francisco, or upon some other persons or persons, corporation or corporations, public or private, heretofore unnamed; (3) that this plaintiff was the tool, sycophant [18] or hireling of the said Eugene J. Sullivan, and, therefore, of "a thief" and "of a man who ought to be in the penitentiary" and that as such he would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to truth and right; and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of the said Sullivan:

That said charges so made and published by the defendants and each of them and so understood, and by them and each of them intended to be understood by the readers of said special Washington edition of said San Francisco "Examiner" were, and are in every particular false, misleading, defamatory, libelous, unprivileged, and without excuse and that

they had a tendency to and did and do expose plaintiff to hatred, contempt and obloquy by imputing to him the basest, meanest and most untrustworthy traits of character as a man, neighbor and citizen and had a tendency to and did and do injure him in his good name, reputation and business occupation and profession and that said charge was published and circulated by said defendants and each of them with express malice on the part of each of said defendants, and with the design and intent on the part of each of them to outrage the feelings of plaintiff and to cause him to be shunned and avoided by his fellow citizens, and to destroy his reputation and character for honesty and integrity and to hold him out to the people of the United States and elsewhere as being devoid of honesty and integrity and by reason of an alleged business association with a man stigmatized as a "thief" and "who ought to be in the penitentiary" as being unworthy of any personal or professional trust or confidence, and to injure him in his good [19] name, reputation, business, occupation and profession.

9. That plaintiff has sustained damage by reason of said publication in the sum of One Hundred Thousand Dollars.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the sum on One Hundred Thousand Dollars.

JACOB M. BLAKE,
Attorney for Plaintiff. [20]

State of California,
City and County of San Francisco,—ss.

Taggart Aston, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters that he believes it to be true.

TAGGART ASTON.

Subscribed and sworn to before me this 24th day of July, 1914.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California. [21]

[Endorsed]: Filed July 24, 1914. By Walter B. Maling, Clerk. [22]

Summons.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

TAGGART ASTON,

Plaintiff,

vs

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Action brought in said District Court and the Complaint filed in the office of the Clerk of said District Court in the City and County of San Francisco.

JACOB M. BLAKE,
Plaintiff's Attorney.

The President of the United States of America, Greeting: To Examiner Printing Company, a Corporation and William Randolph Hearst, Defendants.

You are hereby directed to appear and answer the Complaint in an action entitled as above brought against you in the District Court of the United States, in and for the Northern District of California Second Division, within ten days after the service on you of this Summons, if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the Complaint.

Witness the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 24th day of July in the year of our Lord one thousand nine hundred and fourteen and of our independence the one hundred and thirty-ninth.

[Seal] By WALTER B. MALING,
Clerk. [23]

Return of Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Examiner Printing Company, a corporation, by handing to and leaving a true and attested copy thereof with a copy of the Complaint attached thereto with W. F. Bogart, Secretary and Treasurer of the Examiner Printing Company, a corporation, personally at San Francisco, San Francisco County, in said District on the 27th day of July, A. D. 1914.

J. B. HOLOHAN,
U. S. Marshal.
By J. W. Grover,
Office Deputy. [24]

United States Marshal's Office,
Northern District of California.

I Hereby Certify, that I received the within Writ on the 24th day of July, 1914, and personally served the same on the 24th day of July, 1914, upon William Randolph Hearst, by delivering to, and leaving with William Randolph Hearst, said defendant named therein personally, at the City of San Francisco, in said District, a true and attested copy thereof, together with a copy of the Complaint, attached thereto.

San Francisco, July 27th, 1914.

J. B. HOLOHAN,
U. S. Marshal.
By J. W. Grover
Office Deputy.

[Endorsed]: Filed July 29, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Demurrer of Defendant Examiner Printing Company.

Now comes the Examiner Printing Company, a corporation, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff therein and for grounds of demurrer specifies the following:

1. Said complaint does not state facts sufficient to constitute a cause of action against this defendant.

2. The above-entitled court is without jurisdiction of the subject matter of said action.

3. Said complaint is uncertain in each of the following particulars in that it does not appear therein nor can it be ascertained therefrom:

(a) Where in the State of California the Mokelumne source of water supply is situated;

(b) By whom the plaintiff herein was employed

as a consulting engineer, as alleged in paragraph V of said complaint;

(c) Who were the clients or any of the clients of the plaintiff referred to in paragraph V of said complaint;

(d) Whether the plaintiff or any of the clients of the plaintiff was pecuniarily interested in the sale of the properties of the Sierra Blue Lakes Water and Power Company, or any thereof [26] to the City and County of San Francisco;

(e) Whether the plaintiff or any of the clients of the plaintiff was pecuniarily interested in any opposition water supply sought to be sold to the City and County of San Francisco, or whether the plaintiff or any of the clients had any pecuniary interest in any of the matters set forth in Plaintiff's Complaint;

(f) By whom the Washington edition of the San Francisco Examiner was published or issued, as alleged in paragraph VI, of said complaint;

(g) By whom copies of said Washington edition have been offered or put in circulation from time to time since December 2, 1912, as alleged in paragraph VI of said complaint;

(h) By whom the article set forth in paragraph VI of said complaint was published;

(i) Where in said Washington edition was the article set forth in paragraph VII of said complaint published with reference to the article set forth in paragraph VI thereof.

4. Said complaint is ambiguous in each of the particulars wherein in paragraph 3 hereof it is

alleged to be uncertain.

5. Said complaint is unintelligible in each of the particulars wherein in paragraph 3 hereof it is alleged to be uncertain.

WHEREFORE, this defendant prays to be hence dismissed with its costs herein incurred.

GARRET W. McENERNEY,
Attorney for Defendant, Examiner Printing Company.

I HEREBY CERTIFY that the foregoing demurrer is in my opinion well taken in point of law and that the same is not [27] interposed for delay.

GARRET W. McENERNEY. [28]

Receipt of a copy of the within Demurrer this 21st day of Aug., 1914, is hereby admitted.

JACOB M. BLAKE,
Attorney for Plaintiff.

[Endorsed]: Filed August 21, 1914. By Walter B. Maling, Clerk. [29]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Demurrer of Defendant William Randolph Hearst.

Now comes William Randolph Hearst, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff therein and for grounds of demurrer specifies the following:

1. Said complaint does not state facts sufficient to constitute a cause of action against this defendant.

2. The above-entitled court is without jurisdiction of the subject matter of said action.

3. Said complaint is uncertain in each of the following particulars in that it does not appear therein nor can it be ascertained therefrom:

(a) Where in the State of California the Mokelumne source of water supply is situated;

(b) By whom the plaintiff herein was employed as a consulting civil engineer, as alleged in paragraph V of said complaint;

(c) Who were the clients or any of the clients of the plaintiff referred to in paragraph V, of said complaint;

(d) Whether the plaintiff or any of the clients of the plaintiff was pecuniarily interested in the sale of the properties of the Sierra Blue Lakes Water and Power Company, or any thereof, to the City and County of San Francisco; [30]

(e) Whether the plaintiff or any of the clients of the plaintiff was pecuniarily interested in any opposition water supply sought to be sold to the City and County of San Francisco, or whether the plaintiff or any of his clients had any pecuniary interest in any of the matters set forth in plaintiff's complaint;

(f) By whom the Washington edition of the San Francisco Examiner was published or issued, as alleged in paragraph VI, of said complaint;

(g) By whom copies of said Washington edition have been offered or put in circulation from time to time since December 2, 1912, as alleged in paragraph VI, of said complaint;

(h) By whom the article set forth in paragraph VI, of said complaint was published;

(i) Where in said Washington edition was the article set forth in paragraph VII, of said complaint published with reference to the article set forth in paragraph VI thereof.

4. Said complaint is ambiguous in each of the particulars wherein in paragraph 3 hereof it is alleged to be uncertain.

5. Said complaint is unintelligible in each of the particulars wherein in paragraph 3 hereof it is alleged to be uncertain.

WHEREFORE, this defendant prays to be hence dismissed with his costs herein incurred.

GARRET W. McENERNEY,
Attorney for Defendant, William Randolph Hearst.

I HEREBY CERTIFY that the foregoing Demurrer is in my opinion well taken in point of law and that the same is not interposed for delay.

GARRET W. McENERNEY. [31]

Receipt of a copy of the within Demurrer this 21st day of Aug., 1914, is here admitted.

JACOB M. BLAKE,
Attorney for Plaintiff.

[Endorsed]: Filed August 21, 1914. By Walter Maling, Clerk. [32]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Notice of Motion to Strike Out Parts of Complaint.

To the Plaintiff in the Above-entitled Action and to Jacob M. Blake, Esq., Attorney for said Plaintiff:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants in the above-entitled action will, on Monday, the 24th day of August, 1914, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, Post-office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, move said Court for an order striking from the complaint in the above-entitled action the following matters:

(1) Commencing on page 2, line 6, with the words: "and that he is," and ending on page 3, line

1, of the complaint, with the words: "or thereabouts."

(2) Commencing on page 5, line 23, with the words: "that there was appropriated by the Congress of the United States of America," and ending on page 5, line 26, with the words: "Army Engineers."

(3) Commencing on page 5, line 26, with the words: "that it then and there became the sacred duty" and ending on page 6, line 4, with the words: "and adjacent bay cities."

(4) Commencing on page 6, line 4, with the words: "And that in the months subsequent," and ending on page 6, line 9, with the words: "Freeman Report." [33]

(5) Commencing on page 6, line 9, with the words: "that theretofore and in the month of April," and ending on page 6, line 18, with the words: "in said State of California."

(6) Commencing on page 6, line 18, with the words: "that said survey and report," and ending on page 6, line 25, with the words: "said Advisory Board of Army Engineers."

(7) Commencing on page 6, line 25, with the words: "that in this condition," and ending on page 7, line 4, with the words: "full development of Lake Eleanor."

(8) Commencing on page 7, line 18, with the words: "and immediately thereupon," and ending on page 7, line 27, with the words: "for the uses and purposes aforesaid."

(9) Commencing on page 7, line 27, with the words: "and that said city," and ending on page 8, line 1, with the words: "aforesaid."

(10) Commencing on page 8, line 9, with the words: "That on or about the month of June," and ending on page 8, line 15, with the words, "hydro-electric purposes."

(11) Commencing on page 8, line 15, with the words: "and in the course of his investigation," and ending on page 8, line 19, with the words, "for domestic use per day."

(12) Commencing on page 8, line 19, with the words: "that thereafter," and ending on page 8, line 30, with the words: "Advisory Board of Army Engineers."

(13) Commencing on page 8, line 30, with the words: "that acting in performance of," and ending on page 9, line 1, with the words: "to their profession."

(14) Commencing on page 9, line 1, with the words: "plaintiff on or about the 14th day of June," and ending on page 9, line 6, with the words: "the effect as aforesaid." [34]

(15) Commencing on page 9, line 7, with the words: "acting from the motives," and ending on page 9, line 9, with the words, "advice and consent of his clients."

(16) Commencing on page 10, line 27. with the words: "that thereafter one Eugene J. Sullivan," and ending on page 11, line 2 with the words, "particular knowledge of plaintiff."

(17) Commencing on page 11, line 2, with the words: "that said Committee on Public Lands," and ending on page 11, line 8, with the words; "the Mokelumne sources."

(18) Commencing on page 11, line 8, with the words: "that thereafter and during the rest of said special session," and ending on page 11, line 17, with the words; "to that of the said Sullivan."

(19) Commencing on page 11, line 23, with the words: "and that he the plaintiff was actuated," and ending on page 11, line 27, with the words: "purpose aforesaid and no other,"

(20) Commencing on page 11, line 27 with the words: "that no fact or circumstances," and ending on page 12, line 2, with the words: "the City of San Francisco."

(21) Commencing on page 12, line 2, with the words; "or that plaintiff alone," and ending on page 12, line 8, with the words; "public or private."

(21a) Commencing on page 12, line 26, with the words: "that up receiving notice," and ending on page 13, line 20, with the words: "said bill H. R. No. 7207.

(22) Commencing on page 13, line 29, with the words: "in the special interest of said city of San Francisco," and ending on page 13, line 4, with the words: "said Examiner Printing Company,"

(23) Commencing on page 13, line 5, with the words; "in the special interest of the City of San Francisco," and ending on [35] page 13, line 10, with the words: "in said City of San Francisco."

(24) Commencing on page 13, line 10, with the words; "conceived and laid out," and ending on page 13, line 20, with the words: "said bill H. R. No. 7207."

(25) Commencing on page 13, line 25, with the

words; "that plaintiff is informed an believes," and ending on page 14, line 1, with the words; "William Randolph Hearst."

(26) Commencing on page 14, line 1, with the words: "that it is the only," and ending on page 14, line 8, with the words: "said bill was in progress."

(27) Commencing on page 14, line 8, with the words; "that it was the first," and ending on page 14, line 18, with the words: "of the United States."

(28) Commencing on page 14, line 18, with the words: "also that it was the only paper," and ending on page 14, line 22, with the words: "in said capital."

(29) Commencing on page 14, line 22, with the words; "that plaintiff is informed and believes," and ending on page 14, line 26, with the words: "than the San Francisco Examiner."

(30) Commencing on page 14, line 27, with the words; "and that as plaintiff," and ending on page 15, line 1, with the words; "William Randolph Hearst."

(31) Commencing on page 15, line 1, with the words: "and of the attorneys," and ending on page 15, line 9, with the words; "San Francisco Examiner as aforesaid."

(32) Commencing on page 15, line 10, with the words; "that at and prior to the time," and ending on page 15, line 16, with the words; "passage of said bill."

(33) Commencing on page 15, line 16, with the words; "and much public criticism had been and was indulged in," and ending on page 15, line 22,

with the words; "for said City of San Francisco." [36]

(34) Commencing on page 15, line 23, with the words; "that said suppressed report was unknown," and ending on page 15, line 25 with the words: "Bartell-Manson Report."

(35) Commencing on page 15, line 25, with the words; "and that the fact of the suppression," and ending on page 15, line 30, with the words; "on the 7th day of July, 1913."

(36) Commencing on page 15, line 30, with the words; "that no reference was made," and ending on page 16, line 4, with the words: "by said City of San Francisco."

(37) On page 16, line 5, the words; "but that on the other hand."

(38) Commencing on page 16, line 28, with the words: "that by reason of all of the foregoing," and ending on page 17, line 4, with the words; "throughout all of said places."

(39) Commencing on page 17, line 4, with the words; "that said newspaper by reason of the fact," and ending on page 17, line 9, with the words; "into whose possession they came."

(40) Commencing on page 17, line 9, with the words; "that many copies thereof," and ending on page 17, line 12, with the words; "said 2d day of December, 1912."

(41) Commencing on page 19, line 9, with the words; "and that as such he would stultify himself," and ending on page 19, line 11, with the words; "without reference to truth and right."

(42) Commencing on page 19, line 12, with the words; "and that he had so de*ma*ned himself," and ending on page 19, line 16, with the words; "at the bidding and behest of the said Sullivan."

Said motion will be made upon the ground that the matters above enumerated are and each thereof is irrelevant, immaterial and redundant.

Said motion will be based upon all the records and files in the action. [37]

Dated August 21, 1914.

GARRET W. McENERNEY,
Attorney for Defendants. [38]

Receipt of a copy of the within Demurrer this 21st day of Aug., 1914, is hereby admitted.

JACOB M. BLAKE,
Attorney for Plaintiff.

]Endorsed]: Filed August 21, 1914. By Walter B. Maling, Clerk. [39]

[Order Overruling Demurrers to Complaint, Submitting Motion to Strike, etc.]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 24th day of August, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, Distrist Judge.

No. 15,780.

TAGGART ASTON,

vs.

EXAMINER PRINTING CO. et al.

The demurrers of the defendants to the complaint and the defendants' motion to strike out parts of complaint came on this day to be heard and after arguments by counsel were submitted. The demurrers being fully considered it was ordered that said demurrers be and the same are hereby overruled and that the motion to strike out be taken under consideration for decision. Ordered that defendants may have ten days after notice or decision on said motion within which to answer. [40]

[Order Granting Motion to Strike Out Parts of Complaint, as to Specifications 1 to 9, Inclusive, etc.]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 31st day of August, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, Distrist Judge.

No. 15,780.

TAGGART ASTON,

vs.

EXAMINER PRINTING CO. et al.

Defendants' motion to strike out parts of the complaint, heretofore heard and submitted, being now fully considered and the Court having filed its memorandum thereon, it was ordered that said motion be and the same is hereby granted as to specifications Nos. 1 to 9, inclusive, and denied as to all other specifications. [41]

In the District Court of the United States, for the Northern District of California, Second Division.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Amended Complaint.

Leave of Court first having been obtained to file his Amended Complaint herein, the plaintiff for a cause of action against the defendants complains and alleges;

1. That the plaintiff is an alien and was born in foreign parts, and is and at all the times hereinafter mentioned was, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times herein mentioned, a resident of and inhabitant of the State of California residing at Berkeley, in the County of Alameda, in said State, in the Northern District thereof;

that plaintiff for more than fifteen years last past has been continuously and actively engaged in the practice of his profession as a civil engineer in different parts of the English-speaking world and is, and was at all the times hereinafter mentioned, so engaged in practicing his said profession in the United States of America.

2. That the defendant, Examiner Printing Company is, and at all the times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, State of California, and is, and was at all of said times, a citizen and inhabitant of said state and within the jurisdiction of said District Court of the United States for the Northern District of California; that the [42] defendant, William Randolph Hearst, is, and at all the times hereinafter mentioned was, a citizen of the United States and a citizen and resident of the State of New York and an inhabitant of the City of New York in said State.

3. That in the year 1913 and for many years prior thereto the City of San Francisco, in the State of California, was, and had been, engaged in a continuous effort to solicit and obtain large and valuable concessions, franchises, rights of way, and other special privileges and immunities from the Government of the United States of America for the purpose of obtaining a domestic water supply and of owning, developing and maintaining large and valuable power plants to be operated for and on behalf

of the special interest of said City of San Francisco and of the inhabitants thereof, in and upon lands of the said United States, situated in the Sierra Nevada Mountains in the State of California; that on or about the 11th day of May, 1908, the then Secretary of the Interior of the United States of America, upon the application of said City of San Francisco therefor, granted to said city a permit for a right of way and franchise to build, construct and maintain a dam and reservoir for the uses and purposes aforesaid at Lake Eleanor in Tuolumne County in the State of California and also for the right of way and franchise to build, construct and maintain a dam and reservoir in the Hetch Hetchy Valley in said county and state last aforesaid, upon the condition and with the express understanding and agreement on the part of said City of San Francisco that it would develop the Lake Eleanor site to its full capacity before beginning the development of the Hetch Hetchy site and that the development of the latter would be begun only when the needs of the City and County of San Francisco and adjacent cities, which may join with it in obtaining a common water supply, may require such further development; [43] and that said permit was and has has been, and now is, known as the Garfield permit"; that thereafter and on or about the 25th day of February, 1910, the then Secretary of Interior of the United States of America issued and caused to be duly served upon said City of San Francisco an order to show cause why that position of said Garfield permit granting a right of way and franchise

to said City of San Francisco to build, construct and maintain said Hetch Hetchy dam and reservoir should not be revoked and canceled and why the Hetch Hetchy valley and reservoir site should not be eliminated from said Garfield permit that thereafter and on the 12th day of May, 1910, the then Secretary of the Interior requested the Secretary of War to appoint a Board of Army Engineers to act as an advisory board in the determination of the questions to arise upon the hearing of said order to show cause; that thereafter and on the 27th day of May, 1910, the then Secretary of the Interior made an order granting said City of San Francisco to and including June 1, 1911, within which the said City of San Francisco should answer said order to show cause why Hetch Hetchy dam and reservoir site should not be eliminated from said Garfield permit; that said order of continuance last aforesaid was granted upon the conditions and for the purpose, as stated therein, following, to wit: "Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and watershed contributary, or which may be made contributary thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonable prospective needs of said City of San Francisco and adjacent bay [44] cities without the inclusion of the Hetch Hetchy Valley as a part of said sources of supply,

and whether it is necessary to include said Hetch Hetchy Valley as a source of municipal water supply for said City and County of San Francisco and bay cities.

"In granting said postponement and continuance it is understood said City and County of San Francisco will at once proceed, at its own expense and with due diligence, to secure and furnish to said Advisory Board of Army Engineers all necessary data upon which to make the determination aforesaid, and pending the hearing upon said order to show cause, no attempt shall be made by said city or any of its officers or agents to acquire, as against the United States, any other or different rights to the Hetch Hetchy Valley than it now has under said permit, and that no effort shall be made by said city to develop said Hetch Hetchy Valley site."

4. That thereafter from time to time the then Secretary of the Interior granted other and further continuances of said hearing until the final date for the submission of the case of said City of San Francisco in answer to said order to show cause was fixed for the first day of August, 1912, and that thereafter the final hearing was held before the then Secretary of the Interior in Washington in the District of Columbia on November 25th to 30th, inclusive, 1912; that after the hearing before the then Secretary of the Interior in November, 1912, as aforesaid, and on or about, to wit: March 1st, 1913, the then Secretary of the Interior refused to base any official action upon the report of said Advisory Board of Army Engineers or upon the data and reports fur-

nished by said City of San Francisco in answer to said order to show cause why the Hetch Hetchy Valley and reservoir should not be eliminated from the Garfield permit, upon the ground, among others, that the Congress of the United States [45] of America possessed the exclusive power and jurisdiction to grant an irrevocable right of way and franchise such as was included in the Garfield permit: That thereafter and on the 7th day of April, 1913, Congress of the United States of America convened in Washington, in the District of Columbia, in the first and special session of the 63d Congress; that at various times during the year 1913, the respective Congressional committees having jurisdiction of matters pertaining to the public lands of the United States held public hearings upon bills introduced in Congress, having for their object the granting to said city of San Francisco the said rights of way, franchises and special privileges to use the Hetch Hetchy dam and reservoir site for the uses and purposes aforesaid.

5. That on or about the month of June, 1913, the plaintiff herein was employed as a consulting civil engineer to make a survey in the field and to prepare notes, maps, profiles and a report of and concerning the availability of the Mokelumne River sources in the Sierra Nevada Mountains in California, aforesaid as an available source of water supply for irrigation and hydro-electrical purposes, and in the course of his investigations under such employment then and there discovered that, in extent and adequacy, said sources would economically

supply the City of San Francisco with at least 350,000,000 gallons of pure mountain water for domestic use per day; that thereafter and on or about the month of June, 1913, plaintiff discovered that the said availability and adequacy of said Mokelumne sources of water supply, when used in connection with the Lake Eleanor basin and watershed, to supply all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities were and had been since 1912 intimately and accurately known to the city engineers of the City of San Francisco by and through a report [46] prepared by and under the direction of the then city engineer of said city in April, 1912, but that neither the facts contained therein nor the report itself had been furnished to said Advisory Board of Army Engineers; that acting in performance of the duty owing by civil engineers to their profession, plaintiff on or about the 14th day of June, 1913, voluntarily and upon his own initiative, but with the advice and consent of his clients, advised a member of the Committee on Public Lands of the House of Representatives of the United States of America substantially to the effect as aforesaid and that, on or about the 23d day of June, 1913, plaintiff, acting from the motives and with the purposes aforesaid, voluntarily and upon his own initiative, but with the advice and consent of his clients, advised the chairman of said Public Lands Committee, among other things, that said City of San Francisco had suppressed from said Board of Army Engineers a carefully considered

report made by and under the direction of its then city engineer in April, 1912, wherein and whereby it was fully and accurately shown that an amount of water for domestic uses could be supplied to San Francisco from the Mokelumne River sources which, combined with Lake Eleanor was sufficient for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities; that thereupon and as a result of said communications an adjourned meeting of said Committee on Public Lands of said House of Representatives was set for July 7th, 1913, for the purpose of hearing and determining the facts aforesaid and to give opportunity to parties then in the City of San Francisco to appear and testify regarding the same before said committee in Washington; that thereafter one Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, against the wishes of plaintiff and his clients, appeared before said Committee on Public Lands of the House of Representatives and testified to the best of his ability concerning [47] the facts which were within the particular knowledge of plaintiff; that said Committee on Public Lands sought to discredit the testimony of the said Sullivan upon the ground of his personal interest in the said Sierra Blue Lakes Water and Power Company, and because said company owned water rights which would have to be purchased by said City of San Francisco if it obtained its water supply from the Mokelumne sources; that thereafter and during all the rest of said special session of Congress and up to and until

the date that said bill granting said right of way, franchise and special privileges to the City of San Francisco, was passed by the Congress of the United States of America, it became and was the sole object of said City of San Francisco acting by and through its agents and lobbyists to discredit the statements made by and furnished to said Committee on Public Lands of said House of Representatives by the plaintiff herein by attaching the interest of said plaintiff to that of the said Sullivan; that during none of the time herein mentioned was the plaintiff in the employ of the said Sullivan or acting by or under his direction or control, nor did he have any pecuniary interest in the sale of properties of the Sierra Blue Lakes Water and Power Company, located on the Mokelumne River, to said City of San Francisco, and that he, the plaintiff, was actuated in furnishing the statements and reports to said Committee on Public Lands concerning the availability and adequacy of said Mokelumne sources of water supply for said City of San Francisco from the pure motives and with the honest purposes aforesaid and no other; that no facts or circumstances were proved or offered to be proved before any of the committees of Congress which would show otherwise, or which would particularly show that plaintiff, alone, or in combination or conspiracy with the said Sullivan or any other person pretended to have an opposition [48] water supply to sell to the City of San Francisco, or that plaintiff alone, or in combination or conspiracy with the said Sullivan or anyone else,

was engaged in an attempt to perpetrate a gross fraud or any fraud upon the government of the United States or the City of San Francisco or upon any other person or persons, interest or interests, corporation or corporations public or private.

6. That on or about September 3d, 1913, the said Committee on Public Lands of the House of Representatives having favorably reported the bill designated "bill H. R. 7207 entitled 'A Bill Granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park, and Stanislaus National Forest and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes,' " being a bill for an act of Congress granting said City of San Francisco said right of way, franchises and special privileges to construct, maintain and operate said dam and reservoir in said Hetch Hetchy Valley for domestic supply and hydro-electric power purposes as aforesaid, the same was passed by the House of Representatives aforesaid; and thereafter and on the 1st day of December, 1913, said bill came up for consideration and debate in the Senate of the United States under a rule requiring said debate to be closed and a vote to be taken thereon on the 6th day of December, 1913; that upon receiving notice of the time said bill would be up for debate in said Senate of the United States the defendant, the Examiner Printing Company in the special interest of said City of San Francisco and for the purpose of increasing the power, prestige and in-

fluence of the daily newspaper printed and published by it in said city—the San Francisco Examiner—and to increase and augment the value of the goodwill of said newspaper [49] and of said Examiner Printing Company, and the defendant, William Randolph Hearst, in the special interest of the City of San Francisco for the purpose of augmenting his own individual personal and political power and influence in the different parts of the United States of America as aforesaid and in the interest of further increasing the value of the goodwill of his newspaper interests in said City of San Francisco conceived and laid out the plan of issuing a special Washington edition of the San Francisco Examiner by printing, publishing and circulating in the City of Washington, in the District of Columbia, and elsewhere in the United States of America and throughout the world, an issue of said newspaper to be known as The San Francisco Examiner which should contain no other subject matter, news, dispatches, special articles or other printed reading matter than that pertaining and favorable to and which tended to promote the passage by the Senate of the United States of America of said bill H. R. No. 7207; that the said special Washington edition of the San Francisco Examiner was thereupon and on December 2, 1913 printed, published and issued in the City of Washington in the District of Columbia and consisted of sixteen pages entirely devoted to the favorable consideration of the bill known as bill H. R. No. 7207; that plaintiff is informed and believes and therefore alleges that the said Washington edition

of said San Francisco Examiner was without precedent in the following and each of the following particulars, that is to say; that it was the first newspaper to be edited, printed and published under the direct personal control, management and supervision of the defendant, William Randolph Hearst; that it is the only newspaper ever issued at the capital of the United States of America for the express and only purpose of directly influencing the action of Congress of the United States in favor of the passage of a bill **[50]** granting rights of way, franchises and special privileges and immunities belonging to all of the people of the United States in behalf of a special interest while the debate upon the passage of said bill was in progress; that it was the first and only paper, issued under such circumstances, to contain what purports to be signed statements and interviews of special articles by the Vice-president of the United States of America, and by members of the Cabinet of the President of said United States, and by the speaker of the House of Representatives of the United States, and by a Representative in Congress and by a large number of members of the Senate of the United States expressing favorable sentiments in behalf of and endorsing the passage of such a bill at the time when said bill was under discussion in the Congress of the United States; also that it was the only paper that was ever printed and published in the Capital of the United States of America, for the purpose and under the circumstances hereinbefore stated, by a newspaper publisher or proprietor who did not own, print or pub-

lish a newspaper in said capital; that plaintiff is informed and believe and therefore alleges that the reportorial and mechanical work upon said paper was done by members of the staff of other and different newspapers, owned or controlled by said defendant, William Randolph Hearst, and printed and published in other metropolitan cities in the United States than San Francisco, State of California and that, as plaintiff is informed and believes and therefore alleges, said signed interviews and statements with the officers, agents and trustees of the Government of the United States were obtained by and through the personal influence of the defendant, William Randolph Hearst, and of his attorneys, emissaries and agents brought to the capital of the United **[51]** States from New York and Chicago and other places where the said defendant operates and conducts his newspaper enterprises, by the said defendant, William Randolph Hearst, and at his expense and at the expense of the defendant, Examiner Printing Company, for the purpose of obtaining said signed special articles and interviews and of editing, printing and publishing said special Washington edition of said San Francisco Examiner as aforesaid; that at and prior to the time said bill came up for debate in the Senate of the United States, as aforesaid, considerable public attention and interest throughout the different parts of the United States had become centered upon the obviously great efforts that were being made by the agents and lobbyists maintained at Washington as aforesaid by said City of San Francisco in behalf of the passage of

said bill and much public criticism had been and was indulged in between the months of June and December, 1913, by the press of the United States over and concerning the suppression from the Advisory Board of Army Engineers of the favorable report of the city engineer of said San Francisco, prepared in April, 1912, as aforesaid, showing the availability and adequacy of the Mokelumne source of water supply for said City of San Francisco; that said suppressed report was known to the press and the public of the United States as the "Bartell Report" and the "Bartell-Manson Report"; that the fact of the suppression of said report was first made public by and through the statements and communications made by the plaintiff as aforesaid and was first publicly testified to before the Committee on Public Lands of the House of Representatives by the said Engene Sullivan on the 7th day of July, 1913; that no reference was made in said special Washington edition of said San Francisco Examiner by said defendants, Hearst and Examiner Printing Company, to said Bartell-Manson Report or to the fact of its suppression and the concealment thereof from the Advisory Board of Army Engineers by [52] said City of San Francisco; but that on the other hand said defendants vilified personally said Eugene J. Sullivan and sought to discredit the testimony of said Sullivan by charging him with being a thief and by printing and publishing on the sixth page of said special Washington edition of said San Francisco Examiner under the following headline in black-faced type

"THIEF WITH THE NATURE LOVERS"

the following statement also in black-faced type attributed to a congressman of the United States of America from the State of California:

"I want to state here and now that I have read this literature put out by these people (meaning the statements of the plaintiff and the said Eugene Sullivan concerning the suppression of the "Bartell-Manson Report" as aforesaid and the statement of the plaintiff and the said Sullivan that the said Mokelumne sources of water supply were reasonably available and adequate for all present and reasonably prospective needs of said City of San Francisco and the adjacent bay cities).

It has only one foundation in fact and that foundation is the letters of this man Sullivan (meaning the Eugene J. Sullivan), whom we proved in the hearings in the House (meaning the House of Representatives) to be a thief and a man who ought to be in the penitentiary."

That by reason of all of the foregoing special and particular facts and circumstances surrounding the printing and publishing of said special Washington edition of said San Francisco Examiner said newspaper became and was an object of great interest and attention in the City of Washington and elsewhere throughout the United States and was widely circulated and read throughout all of said places; that said newspaper by reason of the fact that [53] it contained no transient or fugitive news, but was entirely devoted to said Hetch Hetchy project possessed a permanent value and held a continuing in-

terest which has had the effect to cause the copies thereof to be preserved by those into whose possession they came; that many copies thereof have been offered and put into circulation from time to time since said second day of December, 1912, in the said City of San Francisco, State of California by said defendants Examiner Printing Company and William Randolph Hearst.

7. That on said second day of December, 1913, and at the City of Washington aforesaid the said defendants, William Randolph Hearst, as the managing editor in charge of, and the said defendant, Examiner Printing Company as the proprietor and publisher of said special Washington edition of said San Francisco Examiner did print and publish in said newspaper and did thereby circulate in and throughout the said City of Washington and elsewhere throughout the United States of America and the English speaking world at large, of and concerning the plaintiff the following defamatory and libelous statements, to wit:

"INSPIRATION OF OPPOSITION

"During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very

angry when Sullivan was referred to [54] as his friend, though he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston."

8. That by the use and publication of said words and language, used and published by said defendants, and each of them as aforesaid, on the seventh page of said special Washington edition of said newspaper and opposite the publication of the words and language heretofore set out charging the said Eugene J. Sullivan to be "a thief" and "a man who ought to be in the penitentiary," they and each of them intended to charge and assert, and to be understood as charging and asserting, and were by the readers of said newspaper in fact understood as charging and asserting, (1) that this plaintff was guilty of the fraudulent intent, purpose and design to combine and conspire with the said Eugene J. Sullivan to perpetrate a gross fraud upon the City of San Francisco by and through the sale to said city of a worthless opposition water supply and that said plaintff did pretend to have such opposition water supply to sell to said city and that, because he pretended with said Sullivan to have such opposition water supply to sell to said city he was led to and did make gross and careless aspersions on said city of San Francisco, the Advisory Board of Army Engineers and engineers generally (meaning thereby to refer to the statements that had been made before various congressional hearings upon the authority of plaintiff concerning the suppression

of said Bartell-Manson Report by said City of San Francisco);

(2) That this plaintiff had been proved at the hearing before the Committee on Public Lands of the House of Representatives to be guilty of combining and conspiring with said Eugene J. Sullivan to perpetrate and of perpetrating a gross fraud [55] either upon said committee, or upon the House of Representatives, or upon Congress, or upon the City of San Francisco, or upon some other person or persons, corporation or corporations, public or private, heretofore unnamed;

(3) That this plaintiff was the tool, sycophant or hireling of said Eugene J. Sullivan, and, therefore, of "a thief" and "of a man who ought to be in the penitentiary" and that as such he would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to Truth and Right; and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of the said Sullivan:

That said charges so made and published by the defendants and each of them and so understood, and by them and each of them intended to be understood by the readers of said special Washington edition of said "San Francisco Examiner" were, and are in every particular false, misleading, de-

famatory, libelous, unprivileged, and without excuse, and that they had a tendency to and did and do expose plaintiff to hatred, contempt and obloquy by imputing to him the basest, meanest and most untrustworthy traits of character as a man, neighbor and citizen and had a tendency to and did and do injure him in his good name, reputation, and business, occupation and profession and that said charge was published and circulated by said defendants and each of them with express malice on the part of each of said defendants, and with the design and intent on the part of each of them to outrage the feelings of plaintiff and to cause him to be shunned and avoided by his fellow citizens, and to destroy his reputation and character for honesty and integrity; and to hold him out to the people of the United [56] States and elsewhere as being devoid of honesty and integrity and by reason of an alleged business association with a man stigmatized as a "thief" and "who ought to be in the penitentiary," as being unworthy of any personal or professional trust or confidence, and to injure him in his good name, reputation, business, occupation and profession.

9. That plaintiff has sustained damage by reason of said publication in the sum of One Hundred Thousand Dollars.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the sum of One Hundred Thousand Dollars.

JACOB M. BLAKE,
Attorney for Plaintiff. [57]

In the District Court of the United States, for the Northern District of California, Second Division.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Stipulation and Order Allowing Plaintiff to File Amended Complaint.

It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled action that an order may be made and entered in the above-entitled court allowing the plaintiff above named to file an amended complaint. It is also further stipulated on the part of defendant that verification of said complaint is hereby waived.

Dated San Francisco, California, September 2, 1914.

JACOB M. BLAKE,
Attorney for Plaintiff,
GARRET W. McENERNEY (B),
Attorney for Defendants.

Upon reading and considering the foregoing stipulation, it is hereby ordered that the plaintiff be and hereby is allowed to file his amended complaint in the above-entitled court and cause.

Dated this 3d day of September, 1914.

WM. C. VAN FLEET,
Judge of the District Court.

Due service of within amended Complaint admitted by copy this 2d day of September, 1914.

GARRET W. McENERNEY,
Attorney for Defendants. [58]

[Endorsed]: Filed September 3, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [59]

In the District Court of the United States, for the Northern District of California, Second Division.

Action No. 15,780—Dept. No. ——.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Answer of Examiner Printing Company.

Now comes EXAMINER PRINTING COMPANY, a corporation, one of the defendants in the above-entitled action, and in answer to the complaint of the plaintiff therein admits, denies and alleges as follows:

I.

This defendant denies each and every of the allegations of said complaint, save and except as are

hereinafter expressly admitted.

II.

Admits the allegations of paragraph II of said complaint.

III.

Admits that the special Washington edition of the "San Francisco Examiner" referred to in paragraphs VII and VIII of plaintiff's complaint was published by this defendant.

WHEREFORE this defendant prays that plaintiff take nothing by his action, and that this defendant be hence dismissed with its costs herein incurred.

GARRET W. McENERNEY,
Attorney for Defendant. [60]

[Endorsed]: Filed September 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

In the District Court of the United States, for the Northern District of California, Second Division.

Action No. 15,780—Dept. No. ——.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Answer of Defendant William Randolph Hearst.

Now comes WILLIAM RANDOLPH HEARST,

one of the defendants in the above-entitled action, and in answer to the complaint of the plaintiff therein admits, denies and alleges as follows:

I.

This defendant denies each and every of the allegations of said complaint, save and except as are hereinafter expressly admitted.

II.

Admits the allegations of paragraph II of said complaint.

WHEREFORE said defendant prays that plaintiff take nothing by his action, but that defendant be hence dismissed with his costs herein incurred.

GARRET W. McENERNEY,
Attorney for Defendant.

Receipt of a copy of the within Answer this 23d day of Sept., 1914, is hereby admitted.

JACOB M. BLAKE,
Attorney for Plaintiff. [62]

[Endorsed]: Filed September 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Notice of Motion to File Amended Answer.

To the Plaintiff in the Above-entitled Action and to Jacob M. Blake, Esq., Attorney for said Plaintiff:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that EXAMINER PRINTING COMPANY, a corporation, one of the defendants in the above-entitled action, will on the 18th day of January, 1915, at the opening of court on said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, Postoffice Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, move said Court for an order permitting it to file an Amended Answer in the above-entitled action. Said motion will be made upon the ground that said Amended Answer is proper and that the allowance of the same will be in the interest of justice; and will be based upon all the records and files in said

action, upon this notice of motion, and upon said Amended Answer, a copy of which is hereto annexed.

Dated San Francisco, January 14, 1915.

GARRET W. McENERNEY,

Attorney for Defendant Examiner Printing Company. [64]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Amended Answer of Examiner Printing Company.

Now comes EXAMINER PRINTING COMPANY, a corporation, one of the defendants in the above-entitled action, and, by leave of Court first had and obtained, files this, its Amended Answer to the Amended Complaint in said action and, by way of said Amended Answer, admits, denies and alleges as follows:

I.

Denies each and every of the allegations of said amended complaint, save and except as hereinafter expressly admitted.

II.

Admits the allegations of paragraph 2 of said amended complaint.

III.

Admits that the Special Washington Edition of the San Francisco Examiner referred to in paragraph 7 and 8 of plaintiff's Amended Complaint was published by this defendant.

For a further and separate Answer and defense, and, by way of justification, this defendant alleges that:

At all of the times mentioned in said Amended Complaint one Eugene J. Sullivan was the president of a corporation known as and called "Sierra Blue Lakes Water and Power Company. [65] (Said corporation claimed to be the owner of certain water rights in and about the Mokelumne River, in the Sierra Nevada Mountains, in the State of California, and at all of said times said corporation, through its said president, Eugene J. Sullivan, was endeavoring to sell said water rights to the City and County of San Francisco and at all of said times opposed the granting of the permit referred to in paragraph 6 of said amended complaint and all other permits of like tenor, substance and effect, for the reason that the alleged water rights of the Sierra Blue Lakes Water and Power Company, represented by said Sullivan, would have to be purchased by the City and County of San Francisco if it obtained its water supply from the Mokelumne sources.

In this behalf this defendant further alleges that there was a great disparity between the water rights

claimed to be owned by said Sierra Blue Lakes Water and Power Company and the water rights actually owned by it, and between the amount of water claimed to be available therefrom to the City and County of San Francisco, in the event it purchased the same, and the amount which would actually be available therefrom in the event of such purchase; and the claims of the Sierra Blue Lakes Water and Power Company and said Eugene J. Sullivan, its President, were at all of said times grossly exaggerated, and said scheme and effort of said Sierra Blue Lakes Water and Power Company, and of its said President, to sell said water rights to the City and County of San Francisco was at all of the times herein mentioned a "gross fraud" in the sense that the claims of said company and of said Sullivan were grossly exaggerated and that there was a great disparity between the rights claimed to be owned by said company and the rights actually owned thereby, and between the amount of water claimed to be available and the amount actually available. [66]

In this behalf, this defendant further alleges that at the times referred to in paragraph 7 of plaintiff's Amended Complaint the plaintiff herein was in the employ of said Sierra Blue Lakes Water and Power Company and had an interest in the alleged water rights owned by said Company, contingent upon the sale of said water rights to the City and County of San Francisco.

For a further and separate answer and defense, and by way of mitigation of damages in the event

that the plaintiff shall be held entitled to recover in said action, this defendant alleges as follows:

Prior to the publication of the article referred to in paragraph 7 of said Amended Complaint, the defendant herein had been informed that Eugene J. Sullivan had testified before the Committee on Public Lands of the House of Representatives of the United States of America that Taggart Aston, the plaintiff herein, was in the employ, as consulting engineer, of Sierra Blue Lakes Water and Power Company, of which said Eugene J. Sullivan was President, and that said Taggart Aston had an interest in the water rights claimed to be owned by said Sierra Blue Lakes Water and Power Company contingent upon the sale of said water rights to the City and County of San Francisco, or some other purchaser; and had further been informed that said Taggart Aston had stated that he had prepared, instigated and was responsible for all statements and charges made by said Eugene J. Sullivan in his telegrams to said Public Lands Committee of the House of Representatives; and, further, that said Taggart Aston, in a telegram to Honorable William Kent, a member of the House of Representatives of the United States of America, dated June 14, 1913, had stated that he had been appointed as consulting engineer by the Sierra Blue Lakes Water and Power Company to investigate their Mokelumne [67] River proposed water supply, and, further, in said telegram had designated and characterized said Sierra Blue Lakes Water and Power Company as his clients; and had further been informed that said

Taggart Aston, in a letter dated June 23, 1913, directed to Honorable Scott Ferris, Chairman of the Public Lands Committee of the House of Representatives of the United States of America, had stated that he had been appointed by the Sierra Blue Lakes Water and Power Company and allied interests, some weeks prior to the date of said letter, to make an examination and report on the Mokelumne River upper catchment as a source of hydro-electric power and water supply. This defendant further alleges that all of the aforesaid matters had prior to the publication referred to in paragraph 7 of said Amended Complaint been made a matter of public record and had been printed in the minutes of the Committee on Public Lands of the House of Representatives of the United States of America, and all of said statements were believed by the defendant and were relied upon by it.

In this behalf this defendant alleges that in and by the use of the term "Sullivan's man Aston" this defendant merely meant to convey the idea that said Aston was an associate of said Sullivan in connection with the Sierra Blue Lakes Water and Power Company and the efforts of that company and of the said Sullivan to sell the alleged water rights of said company to the City and County of San Francisco. In this behalf, this defendant further alleges that it used said term in no opprobrious sense or in any sense other than as herein stated.

Further in this behalf this defendant further alleges that prior to the publication of said article referred to in paragraph 7 of said Amended Complaint

it had been informed that the Advisory Board of Army Engineers, appointed by the Secretary of the [68] Interior of the United States to investigate relative to sources of water supply for San Francisco and Bay communities, had reported that "The project proposed by the City of San Francisco known as the Hetch Hetchy project is about twenty million dollars cheaper than any other feasible project for furnishing an adequate supply"; that the plaintiff herein had asserted that the cost of developing a supply on the Mokelumne River would be "much less than that of the Hetch Hetchy project"; and had further been informed that other competent engineers, including M. M. O'Shaughnessy, City Engineer of San Francisco, C. E. Grunsky, John R. Freeman and H. H. Wadsworth had reported unfavorably to the claims of said Sierra Blue Lakes Water and Power Company. And this defendant further alleges that prior to the publication of said article set forth in paragraph 7 of said Amended Complaint it had been informed that Colonel John Biddell, United States Army, one of the chairmen of the aforesaid Advisory Board of Army Engineers, in a letter to Honorable William Kent, member of the House of Representatives of the United States of America, had stated that the Advisory Board of Army Engineers believed that the estimate of 128,-000,000 gallons daily was about all that could be counted on from the Mokelumne River unless existing water rights be purchased at great expense and unless the land tributary to this river be perpetually deprived of water from this source for irriga-

tion; and had further been informed, as against this finding of the Advisory Board of Army Engineers, that the plaintiff herein had reported to the Honorable Scott Ferris, Chairman of the Public Lands Committee of the House of Representatives, that 350,000,000 gallons daily of pure mountain water could be economically supplied to San Francisco from said Mokelumne River and that the taking of the same would not conflict with any [69] irrigation interests. In this behalf, this defendant further alleges that all of the aforesaid matters had prior to the publication of the article set forth in paragraph 7 of said Amended Complaint been published in the minutes of the Committee on Public Lands of the House of Representatives and in the report of said Committee and were matters of public record, and were believed by and relied upon by this defendant.

This defendant further alleges that prior to the publication of said article set forth in paragraph 7 of said Amended Complaint it had been informed that the legal title to the water rights claimed by the Sierra Blue Lakes Water and Power Company were in dispute and that said company could not deliver the water rights claimed by it, and further that these facts appeared in the report made by H. H. Wadsworth, Assistant Engineer to the aforesaid Advisory Board of Army Engineers, which said report had been ordered printed as a document of the House of Representatives by order of the House of Representatives dated May 27, 1913, and was a matter of public record, and, in this behalf, this defend-

ant alleges that it believed said statements and relied upon the same.

In this behalf, this defendant further alleges that in stating said article set forth in paragraph 7 of said Amended Complaint that said "Sullivan-Aston scheme" was a "gross fraud" it did not intend to charge or assert that said Sierra Blue Lakes Water and Power Company or said Sullivan or said Aston was knowingly engaged in the perpetration of a gross or any fraud, but intended merely to charge and assert that, by reason of the disparity between the claims of said company and of said Sullivan and Aston and the findings of said Advisory Board of Army Engineers [70] and of other competent engineers and of the Committee on Public Lands of the House of Representatives of the United States of America, said scheme was objectively a gross fraud.

WHEREFORE, defendant prays to be hence dismissed with its costs herein incurred.

GARRET W. McENERNEY, (B)
Attorney for Defendant Examiner Printing Company. [71]

Receipt of a copy of the within Notice of Motion this 14th day of January, 1915, is hereby admitted, and all objections as to time of service are hereby waived.

JACOB M. BLAKE,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

At a stated term, to wit, the November term A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 18th day of January, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,780.

TAGGART ASTON,

vs.

EXAMINER PRINTING CO., et al.

Order Granting Defendant Leave to File Amended Answer.

By consent it was ordered that the motion of defendant Examiner Printing Co., for leave to file amended answer be granted. [73]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Amended Answer of Examiner Printing Company.

Now comes EXAMINER PRINTING COMPANY, a corporation, one of the defendants in the above-entitled action, and, by leave of Court first had and obtained, files this, its Amended Answer to the Amended Complaint in said action and, by way of said Amended Answer, admits, denies and alleges as follows:

I.

Denies each and every of the allegations of said Amended Complaint, save and except as hereinafter expressly admitted.

II.

Admits the allegations of paragraph 2 of said Amended Complaint.

III.

Admits that the Special Washington Edition of the "San Francisco Examiner" referred to in paragraphs 7 and 8 of plaintiff's Amended Complaint was published by this defendant.

For a further and separate answer and defense, and by way of justification, this defendant alleges that: [74]

At all of the times mentioned in said Amended Complaint one Eugene J. Sullivan was the president of a corporation known as and called "Sierra Blue Lakes Water and Power Company." Said corporation claimed to be the owner of certain water rights in and about the Mokelumne River in the Sierra Nevada Mountains, in the State of California, and at all of said times said corporation, through

its said President, Eugene J. Sullivan, was endeavoring to sell said water rights to the City and County of San Francisco and at all of said times opposed the granting of the permit referred to in paragraph 6 of said Amended Complaint and all other permits of like tenor, substance and effect, for the reason that the alleged water rights of the Sierra Blue Lakes Water and Power Company, represented by said Sullivan, would have to be purchased by the City and County of San Francisco if it obtained its water supply from the Mokelumne sources.

In this behalf this defendant further alleges that there was a great disparity between the water rights claimed to be owned by said Sierra Blue Lakes Water and Power Company and the water rights actually owned by it, and between the amount of water claimed to be available therefrom to the City and County of San Francisco, in the event it purchased the same, and the amount which would actually be available therefrom in the event of such purchase; and the claims of the Sierra Blue Lakes Water and Power Company and said Eugene J. Sullivan, its President, were at all of said time grossly exaggerated, and said scheme and effort of said Sierra Blue Lakes Water and Power Company, and of its said President, to sell said water rights in the City and County of San Francisco was at all of the times herein mentioned a "gross fraud" in the sense that the claims of said company and of said Sullivan were grossly exaggerated and that there was a great disparity between the rights claimed to be owned by said company and the rights

actually owned thereby, and between the amount of [75] water claimed to be available and the amount actually available.

In this behalf, this defendant further alleges that at the times referred to in paragraph 7 of plaintiff's Amended Complaint the plaintiff herein was in the employ of said Sierra Blue Lakes Water and Power Company and had an interest in the alleged water rights owned by said company, contingent upon the sale of said water rights to the City and County of San Francisco.

For a further and separate answer and defense, and by way of mitigation of damages in the event that the plaintiff shall be held entitled to recover in said action, this defendant alleges as follows:

Prior to the publication of the article referred to in paragraph 7 of said Amended Complaint, the defendant herein had been informed that Eugene J. Sullivan had testified before the Committee on Public Lands of the House of Representatives of the United States of America that Taggart Aston, the plaintiff herein, was in the employ, as consulting engineer, of Sierra Blue Lakes Water and Power Company, of which said Eugene J. Sullivan was President, and that said Taggart Aston had an interest in the water rights claimed to be owned by said Sierra Blue Lakes Water and Power Company contingent upon the sale of said water rights to the City and County of San Francisco, or some other purchaser; and had further been informed that said Taggart Aston had stated that he had prepared, instigated and was responsible for all statements

and charges made by said Eugene J. Sullivan in his telegrams to said Public Lands Committee of the House of Representatives, and, further, that said Taggart Aston, in a telegram to Honorable William Kent, a member of the House of Representatives of the United States of America, dated June 14, 1913, had stated [76] that he had been appointed as consulting engineer by the Sierra Blue Lakes Water and Power Company to investigate their Mokelumne River proposed water supply, and, further, in said telegrams had designated and characterized said Sierra Blue Lakes Water and Power Company as his clients; and had further been informed that said Taggart Aston, in a letter dated June 23, 1913, directed to Honorable Scott Ferris, Chairman of the Public Lands Committee of the House of Representatives of the United States of America, had stated that he had been appointed by the Sierra Blue Lakes Water and Power Company and allied interests, some weeks prior to the date of said letter, to make an examination and report on the Mokelumne River upper catchment as a source of hydro-electric power and water supply. This defendant further alleges that all of the aforesaid matters had prior to the publication referred to in paragraph 7 of said amended complaint been made a matter of public record and had been printed in the minutes of the Committee on Public Lands of the House of Representatives of the United States of America, and all of said statements were believed by the defendant and were relied upon by it.

In this behalf this defendant alleges that in and

by the use of the term "Sullivan's man Aston" this defendant merely meant to convey the idea that said Aston was an associate of said Sullivan in connection with the Sierra Blue Lakes Water and Power Company and the efforts of that company and of the said Sullivan to sell the alleged water rights of said company to the City and County of San Francisco. In this behalf this defendant further alleges that it used said term in no opprobrious sense or in any sense other than as herein stated.

Further in this behalf this defendant alleges that prior to the publication of said article referred to in paragraph 7 of [77] said Amended Complaint it had been informed that the Advisory Board of Army Engineers, appointed by the Secretary of the Interior of the United States to investigate relative to sources of water supply for San Francisco and Bay communities, had reported that "The project proposed by the City of San Francisco known as the Hetch-Hetchy project is about twenty million dollars cheaper than any other feasible project for furnishing an adequate supply"; that the plaintiff herein had asserted that the cost of developing a supply on the Mokelumne River would be "much less than that of the Hetch Hetchy project"; and had further been informed that other competent engineers, including M. M. O'Shaughnessy, City Engineer of San Francisco, C. E. Grunsky, John R. Freeman and H. H. Wadsworth had reported unfavorably to the claims of said Sierra Blue Lakes Water and Power Company. And this defendant further alleges that prior to the publication of said

article set forth in paragraph 7 of said Amended Complaint it had been informed that Colonel John Biddell, United States Army, one of the chairmen of the aforesaid Advisory Board of Army Engineers, in a letter to Honorable William Kent, member of the House of Representatives of the United States of America, had stated that the Advisory Board of Army Engineers believed that the estimate of 128,000,000 gallons daily was about all that could be counted on from the Mokelumne River unless existing water rights be purchased at great expense and unless the land tributary to this River be perpetually deprived of water from this source for irrigation; and had further been informed as against this finding of the Advisory Board of Army Engineers, that the plaintiff herein had reported to the Honorable Scott Ferris, Chairman of the Public Lands Committee of the House of Representatives, that 350,000,000 gallons daily of pure mountain [78] water could be economically supplied to San Francisco from said Mokelumne River and that the taking of the same would not conflict with any irrigation interests. In this behalf, this defendant further alleges that all of the aforesaid matters had prior to the publication of the article set forth in paragraph 7 of said Amended Complaint been published in the minutes of the Committee on Public Lands of the House of Representatives and in the report of said Committee and were matters of public record, and were believed by and relied upon by this defendant.

This defendant further alleges that prior to the

publication of said article set forth in paragraph 7 of said Amended Complaint it had been informed that the legal title to the water rights claimed by the Sierra Blue Lakes Water and Power Company were in dispute and that said company could not deliver the water rights claimed by it, and further that these facts appeared in the report made by H. H. Wadsworth, Assistant Engineer to the aforesaid Advisory Board of Army Engineers, which said report had been ordered printed as a document of the House of Representatives by order of the House of Representatives, dated May 27, 1913, and was a matter of public record, and, in this behalf, this defendant alleges that it believed said statements and relied upon the same.

In this behalf this defendant further alleges that in stating in said article set forth in paragraph 7 of said Amended Complaint that said "Sullivan-Aston scheme" was a "gross fraud" it did not intend to charge or assert that said Sierra Blue Lakes Water and Power Company or said Sullivan or said Aston was knowingly engaged in the perpetration of a gross or any fraud, but intended merely to charge and assert that, by [79] reason of the disparity between the claims of said company and of said Sullivan and Aston and the findings of said Advisory Board of Army Engineers and of other competent engineers and of the Committee on Public Lands of the House of Representatives of the United States of America, said scheme was objectively a gross fraud.

WHEREFORE, defendant prays to be hence dismissed with its costs herein incurred.

GARRET W. McENERNEY, (B)
Attorney for Defendant Examiner Printing Company. [80]

Receipt of a copy of the within Amended Answer this 19th day of January, 1915, is hereby admitted.

JACOB M. BLAKE,
Attorney for Plaintiff.

[Endorsed]: Filed January 20, 1915. Walter B. Maling, Clerk. [81]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY (a Corporation), and WILLIAM RANDOLPH HEARST,

Defendants.

Verdict.

We, the jury, find as against both the defendants the sum of Twenty-eight Hundred Dollars ($2800.00) in favor of plaintiff as compensatory damages.

I. J. TRUMAN,
Foreman.

[Endorsed]: Filed Feby. 4, 1915. By Walter B. Maling, Clerk. [82]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, (a Corporation), and WILLIAM RANDOLPH HEARST,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 20th day of January, 1915, being a day in the November, 1914, term of said court, before the Court and a jury of twelve men, duly impaneled and sworn, to try the issues joined herein: Jacob M. Blake, Esq., appearing as attorney for plaintiff and John J. Barrett, and A. W. Burke, Esqrs., appearing as attorneys for the defendants; and the trial having been proceeded with on the 21st, 22d, 26th, 27th, 28th and 29th days of January and the 2d, 3d, and 4th days of February, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the cause, after argument by plaintiff's attorney and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered

the following verdict, which was ordered recorded, namely; "We, the jury, find as against both the defendants the sum of Twenty-eight Hundred Dollars ($2800.00) in favor of plaintiff as compensatory damages. I. J. Truman, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Taggart Aston, plaintiff, do have and recover of and from Examiner Printing [83] Company (a corporation), and William Randolph Hearst defendants, the sum of two thousand eight hundred and 00/100 ($2800.00) dollars, together with his costs in this behalf expended, taxed at $395.15.

Judgment entered February 4, 1915.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed February 4, 1915. Walter B. Maling, Clerk. [84]

In the District Court of the United States for the Northern District of California.

No. 15,780.

TAGGART ASTON

vs.

EXAMINER PRINTING CO., a Corp., WILLIAM RANDOLPH HEARST.

Clerk's Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 4th day of February, 1915.

[Seal] W. B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed February 4, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[85]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,
Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that, on Wednesday, the 20th day of January, 1915, the above-entitled action

came on regularly for trial before the above-entitled court and a jury, the Honorable Wm. C. Van Fleet presiding, the plaintiff therein being represented by J. M. Blake, Esq., Attorney for said plaintiff, and the defendants being represented by John J. Barrett, Esq., and Andrew F. Burke, Esq. (the two persons last named appearing for Garret W. McEnerney, Esq., Attorney for said defendants). Thereupon, the following proceedngs were had and taken:

On the 21st day of January, 1915, the defendants served upon counsel for the plaintiff and filed in said court notices of exceptions to and of motions to suppress the [86] depositions of William J. Wilsey, George A. McCarthy and Robert Underwood Johnson, which said depositions had theretofore been taken on behalf of the plaintiff and had been theretofore returned to and filed in said court. Said notice of exceptions and motion to suppress the deposition of said William J. Wilsey was as follows:

"*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Notice of Exceptions to Deposition and of Motion to Suppress the Same.

To the Plaintiff in the Above-entitled Action and to JACOB M. BLAKE, Esq., His Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE (a) that the defendants in the above-entitled action hereby except to the action of CHARLES R. STOUGHTON, the person before whom the deposition of WILLIAM J. WILSEY was taken in the above-entitled action, in this, that the said Charles R. Stoughton appeared for and represented the plaintiff on the hearing of said deposition in addition to being the person before whom said deposition was taken, and did on behalf of said plaintiff propound to the witness all the questions propounded on behalf of said plaintiff; (b) that said defendants hereby object and except to said deposition upon the ground that no sufficient notice of the time and place of the hearing of the same was given to these defendants.

YOU ARE FURTHER NOTIFIED that the defendants will, on account of the matters specified in (a) and (b) above, move to suppress the said deposition of said William J. Wilsey when the same is sought to be read in evidence by the plaintiff. Said motion will be based upon all the records and files in said action, including this notice.

DATED, January 20th, 1915.

GARRET W. McENERNEY,
Attorney for Defendants." [87]

Said notice of exceptions and motion to suppress the deposition of said George A. McCarthy was as follows:

"*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Notice of Exceptions to Deposition and of Motion to Suppress the Same.

To the Plaintiff in the Above-entitled Action and to JACOB M. BLAKE, Esq., His Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE (a) that the defendants in the above-entitled action hereby except to the action of HENRY HAGUE DAVIS, the person before whom the deposition of GEORGE A. McCARTHY was taken in the above-entitled action, in this, that the said Henry Hague Davis appeared for and represented the plaintiff on the hearing of said deposition in addition to being the person before whom said deposition was taken, and did on behalf of said plaintiff propound to the witness all the questions propounded on behalf of said plaintiff; (b) that said

defendants hereby object and except to said deposition upon the ground that no sufficient notice of the time and place of the hearing of the same was given to these defendants.

YOU ARE FURTHER NOTIFIED that the defendants will, on account of the matters specified in (a) and (b) above, move to suppress the said deposition of said George A. McCarthy when the same is sought to be read in evidence by the plaintiff. Said motion will be based upon all the records and files in said action, including this notice.

DATED, January 20th, 1915.

GARRET W. McENERNEY,
Attorney for Defendants."

Said notice of exceptions and motion to suppress the deposition of Robert Underwood Johnson was as follows: [88]

"*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Notice of Exceptions to Deposition and of Motion to Suppress the Same.

To the Plaintiff in the Above-entitled Action and to JACOB M. BLAKE, Esq., His Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE (a) that the defendants in the above-entitled action hereby except to the action of CHARLES R. STOUGHTON, the person before whom the deposition of ROBERT UNDERWOOD JOHNSON was taken in the above-entitled action, in this, that the said Charles R. Stoughton appeared for and represented the plaintiff on the hearing of said deposition in addition to being the person before whom said deposition was taken, and did on behalf of said plaintiff propound to the witness all the questions propounded on behalf of said plaintiff; (b) that said defendants hereby object and except to said deposition upon the ground that no sufficient notice of the time and place of the hearing of the same was given to these defendants.

YOU ARE FURTHER NOTIFIED that the defendants will, on account of the matters specified in (a) and (b) above, move to suppress the said deposition of said Robert Underwood Johnson when the same is sought to be read in evidence by the plaintiff. Said motion will be based upon all the records and files in said action including this motion.

DATED, January 20th, 1915.

GARRET W. McENERNEY,
Attorney for Defendants."

Thereafter, on said 21st day of January, 1915, and before the taking of any evidence in said action, said

defendants moved to suppress each of said depositions, and upon the hearing of said motion introduced, and there were received, in evidence each of the said notices of exceptions and motions to suppress [89] aforesaid, and the depositions of each of said witnesses. Said depositions are not here set forth for the reason that the matters shown thereby, upon which the defendants rely in support of their motion to suppress the same, can be and are next hereinafter briefly stated.

Each of said depositions was taken *de bene esse.* Upon the face of each of said depositions it appears that the defendants were represented by counsel upon the taking of said deposition, but that all questions propounded to each of said witnesses on behalf of the plaintiff, were propounded by the notary before whom said deposition was taken, and that except for said notary the plaintiff was unrepresented on the taking of said deposition.

Thereupon, in opposition to said motions to suppress said depositions, the plaintiff offered, and there was received, in evidence three affidavits of Jacob M. Blake, in words and figures, respectively, as follows:

"In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Affidavit of Jacob M. Blake on Behalf of the Plaintiff Opposing the Exceptions of the Defendant to the Deposition of William J. Wilsey and to Their Motion to Suppress the Same.

United States of America,
Northern District of California,—ss.

I, JACOB M. BLAKE, being first duly sworn on oath depose [90] and say that I am the attorney for the plaintiff in the above-entitled action; that I have carefully examined the deposition of WILLIAM J. WILSEY, a witness on behalf of the plaintiff, taken before Charles R. Stoughton, and by him returned to this Court; that I have carefully compared the oral interrogatories propounded to the witness by the said Stoughton with a copy of written interrogatories prepared and forwarded to said Stoughton for the purpose of the examination of said witness, by this affiant; and that the former are identical in form and substance with the latter; also that

said copy of said interrogatories originally so prepared and forwarded to said Stoughton by affiant are attached to and made a part of the said deposition.

JACOB M. BLAKE.

Subscribed and sworn to before me this 21st day of January, A. D. 1914.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California."

"In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Affidavit of Jacob M. Blake on Behalf of the Plaintiff Opposing the Exceptions of the Defendant to the Deposition of George A. McCarthy and to Their Motion to Suppress the Same.

United States of America,
Northern District of California,—ss.

I, JACOB M. BLAKE, being first duly sworn on oath depose and say that I am the attorney for the plaintiff in the above-entitled action; that I have

carefully examined the deposition of GEORGE A. McCARTHY, a witness on behalf of the plaintiff, taken before HENRY HAGUE DAVIS, and by him returned to this Court; that I have carefully compared the oral interrogatories propounded to the witness by the said Davis with a copy of written interrogatories prepared and forwarded to said Davis for the purpose of the examination of said witness by this affiant; and that the former are identical in form and substance with the latter; also that said copy of said interrogatories originally so prepared and forwarded to said Davis by affiant are attached to and made a part of the said deposition.

JACOB M. BLAKE.

Subscribed and sworn to before me this 21st day of January, A. D. 1914.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California." [91]

"*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Affidavit of Jacob M. Blake on Behalf of the Plaintiff Opposing the Exceptions of the Defendant to the Deposition of Robert Underwood Johnson and to Their Motion to Suppress the Same.

United States of America,
Northern District of California,—ss.

I, Jacob M. Blake, being first duly sworn on oath depose and say that I am the attorney for the plaintiff in the above-entitled action; that I have carefully examined the deposition of ROBERT UNDERWOOD JOHNSON, a witness on behalf of the plaintiff, taken before Charles R. Stoughton, and by him returned to this Court; that I have carefully compared the oral interrogatories propounded to the witness by the said Stoughton with a copy of written interrogataries prepared and forwarded to said Stoughton for the purpose of the examination of said witness, by this affiant; and that the former are identical in form and substance with the latter; except that in orally propounding interrogatory No. 2 the said Stoughton inadvertently changed the word 'special' in the second line of the written interrogatory to the word 'original'; also that said copy of said interrogatories originally so prepared and forwarded to said Stoughton by affiant are attached to and made a part of the said deposition; affiant further avers that he requested the said witness, Johnson, in writing to identify and compare for accuracy and correctness, the newspaper clipping of the New York Times of the issue of July 12, 1913, with the original issue of said paper on file in the office of said paper

in New York City, and that he voluntarily offer the same in evidence as an Exhibit to be attached to said deposition; that no request was made by affiant or by any one else on behalf of the plaintiff, to the knowledge of affiant, upon the same Charles R. Stoughton, other than a request by said witness, to have said clipping from said New York Times, attached to and returned with said deposition.

JACOB M. BLAKE.

Subscribed and sworn to before me this 21st day of January, A. D. 1914.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California." [92]

[Certificate of Notary Public to Deposition of W. J. Wilsey and Robert Underwood Johnson.]

Plaintiff further offered in evidence the certificate of Charles R. Stoughton annexed to the deposition of said William J. Wilsey and Robert Underwood Johnson, which certificate is in words and figures as follows, to wit:

(Title Court and Cause.)
State of New York,
County of New York,—ss.

I hereby certify that on this sixth day of January, 1915, before me, a notary public in and for the County of New York, State of New York, at my office at No. 530 5th Avenue in the City of New York, State of New York, personally appeared, pursuant to the notices hereto annexed, between the hours of 10 o'clock A. M. and 2 o'clock P. M., Mr. William J. Wilsey and Mr. Robert Underwood

Johnson, the witnesses named in said notices, and Samuel H. Evins, Esq., appearing for defendants, and the said Mr. William J. Wilsey and Mr. Robert Underwood Johnson being by me first duly cautioned and sworn or affirmed to testify the whole truth and being carefully examined, deposed and said as in the foregoing depositions set forth.

I further certify that the several exhibits attached to said depositions were offered in evidence and marked for identification as is set out in said depositions.

I further certify that the said depositions were then and there reduced to typewriting under my personal supervision and were, after they had been reduced to typewriting, subscribed by the witness, and the same have been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

I further certify that the reasons that the said depositions were taken were that said witnesses reside as follows:

Mr. William J. Wilsey, Portland, Oregon,

Mr. Robert Underwood Johnson, 57 West 45th Street, New York City, N. Y.,

more than one hundred miles from any place at which a district court of the United States for the Northern District of California is appointed to be held by law.

I further certify that I am not of counsel or attorney for either of the parties, nor am I interested in the event of the cause.

WITNESS my hand and official seal at New York

City, State of New York, this 11th day of January, 1915.

[Notarial Seal.] CHARLES R. STOUGHTON,
Notary Public, No. 3555, New York County.
Register's No. 6009.
Commission expires March 30, 1916." **[93]**

[Certificate of Notary Public to Deposition of George A. McCarthy.]

Plaintiff also offered in evidence the certificate of Henry Hague Davis, annexed to the deposition of George A. McCarthy, which said certificate is in words and figures as follows:

"Dominion of Canada,
Province of Ontario, to wit:

I, Henry Hague Davis, of the City of Toronto in the County of York in the Province of Ontario, a notary public by Royal authority, duly appointed, do certify that on this 4th day of January, 1915, before me at my office at No. 10 Adelaide Street East, in the said City of Toronto, personally appeared, pursuant to the notice hereto annexed, between the hours of 10 o'clock A. M. and 1 o'clock P. M., George A. McCarthy, witness erroneously named in said notice as George A. McCarty, and Samuel H. Evins, Esq., of 80 Maiden Lane, Borough Manhattan, New York, U. S. A., appearing for defendants, and the said George A. McCarthy being by me first duly cautioned and sworn to testify the whole truth and being carefully examined, deposed and said as in the foregoing deposition set out.

I further certify that the several exhibits attached to said deposition were offered in evidence and

marked for identification as is set out in said deposition.

I further certify that said deposition was given and completed on the 4th day of January, 1915.

I further certify that on its completion the said deposition was then and there reduced to typewriting under my personal supervision and was, after it had been reduced to typewriting, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

I further certify that the reason the said deposition was taken was that said witness resides at the City of Toronto in the Province of Ontario, more than one hundred miles from the place where this cause is to be tried and more than one hundred miles from any place at which a district court of the United States for the Northern District of California is appointed to be held by law.

I further certify that I am not of counsel or attorney for either of the parties nor am I interested in the event of the cause.

WITNESS my hand and official seal at the City of Toronto, County of York and Province of Ontario, this 4th day of January, 1915.

[Notarial Seal] H. H. DAVIS,
Notary Public in and for the Province of Ontario."

All exhibits introduced in evidence with the foregoing depositions were referred to, described in, marked for identification and attached to the interrogatories prepared by the said Jacob M. Blake, as attorney for the plaintiff, as aforesaid. **[94]**

Thereupon said motions were argued by counsel for the respective parties. The Court denied said motions to suppress said depositions. Counsel for the defendants thereupon excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 1.

Subsequently during the trial of said cause, each of the aforesaid depositions was put in evidence by the plaintiff.

[Testimony of Eugene J. Sullivan, for Plaintiff.]

EUGENE J. SULLIVAN, called as a witness on behalf of the plaintiff, testified that he was and had been since about the year 1910, the President of the Sierra Blue Lakes Water and Power Company; that the properties of that Company were situate in the Counties of Calaveras, Amador and Alpine in the State of California; further, that he knew that the City of San Francisco had commenced its efforts to obtain a mountain source of water supply in 1871 and the application for Hetch Hetchy right of way was first made by the city about the year 1900. Plaintiff then offered and there was received in evidence a certified copy of the decision of the Secretary of the Interior of the United States on the application by the City and County of San Francisco for reservoir sites in Hetch Hetchy Valley and at Lake Eleanor and the Yosemite National Park, dated May 11, 1908, from which decision the following portion was read to the jury:

[Extract from Decision of Secretary of Interior.]

"3. The City and County of San Francisco will develop the Lake Eleanor site to its full capacity before beginning the development of the Hetch Hetchy site, and the development of the latter will be begun only when the needs of the City and County of San Francisco, and adjacent cities which may join with it in obtaining a common water supply, may require such further development. As the drainage area tributary to Lake Eleanor will not yield, under the conditions herein imposed, sufficient run-off in dry years to replenish the reservoir, a diverting dam and canal from Cherry Creek to Lake Eleanor reservoir for the conduct of waste **[95]** flood or extra-seasonal waters to said reservoir is essential for the development of the site to its full capacity, and will be constructed if permission is given by the Secretary of the Interior."

The plaintiff then offered and there was admitted in evidence a certified copy of a letter written by R. A. Ballinger, Secretary of the Interior of the United States, to the Honorable Mayor and Supervisors of the City and County of San Francisco, calling upon said city to show cause "why the Hetch Hetchy Valley and reservoir site should not be eliminated from said permit," (referring to the Garfield permit) and further requiring the City and County of San Francisco to submit said showing on or before the 1st day of May, 1910.

The plaintiff then offered, and there was received in evidence, certified copies of documents of the De-

partment of the Interior of the United States, showing that on May 12, 1910, the Secretary of the Interior of the United States requested the Secretary of War to appoint a Board of Advisory Army Engineers to advise the Secretary of the Interior, at the hearing, of the return of the aforesaid order to show cause; that said Advisory Board of Army Engineers was appointed May 18, 1910, and consisted of John Biddle, Lieut. Col., Corps of Engineers; Harry Taylor, Lieut. Col., Corps of Engineers; Spencer Cosby, Major, Corps of Engineers, Colonel, United States Army, and that on May 26, 1910, said Advisory Board of Army Engineers advised the Secretary of the Interior of the United States as follows:

[Report of Advisory Board of Army Engineers, May 26, 1910.]

"As in the development of the Lake Eleanor system above mentioned, the city now expects to eventually use the Hetch Hetchy Valley, even though the time of this use may be delayed a number of years, and as the occupation of this valley at present or at any future time is considered to be undesirable if it can be avoided, it is recommended that the City of San Francisco, in conjunction with the transbay cities, submit such data about all available sources of supply, either from the **[96]** Sierras or elsewhere, with or without filtration, as will permit the Secretary of the Interior to decide whether these cities could not procure from such other sources at reasonable cost water of good quality and in sufficient quantity so that the use of the Hetch Hetchy

Valley for a water supply may be avoided in practical perpetuity."

Counsel for the plaintiff next offered in evidence a certified copy of proceedings before the Secretary of the Interior, in re use of Hetch Hetchy reservoir site in the Yosemite National Park, held on May 6, 1908, from which the following portion was read to the jury:

[Proceedings Had Before Secretary of Interior, May 26, 1908.]

"The SECRETARY.—Gentlemen, I have had a rough report made to me, a report that has not been completely finished by the Board of Army Engineers on the subject under consideration. (See appendix, Exhibit "A.")

They have indicated to me the substance of their report, pursuant to the action that was taken yesterday, after conference with the gentlemen representing the various parties. The substance of their report is that they advise me, as Secretary of the Interior, that it will be necessary, in order to secure such data as will allow them to intelligently advise this department on the sources of water supply requisite for the present and prospective needs of San Francisco and the bay cities, if the Hetch Hetchy be eliminated, to have detailed investigation and inquiry made into the conditions of the watersheds and so forth.

Now, I am not able to present this report in its completed and final form, but it will be finished and in final form by this board during the day and made part of the record; and in pursuance of that report I

feel it my duty to make an order continuing this matter for further investigation, so that the department may be equipped with all the necessary information to make a final and proper disposition of this question.

An order has been prepared, not in final form either, as I have not had the time to draft it in such form as I wanted it to finally take, but as a preliminary. So that you may all understand the situation, I will read this draft. It will be completed during the day. (See appendix, Exhibit "B.")

There is one additional feature that has not been incorporated in this order that should be incorporated, and that is that the authorities of the City of San Francisco should present to this army board from time to time the data which they acquire, so that the advisory board may know the progress that is being made, and also that they should outline to [97] this board the scope and plan of the investigation which the city proposes to make, in order that the army board can proceed with a perfectly intelligent view of what is going to be done. Now that has not been incorporated in this report; and also the general details of the methods of developing these proposed sources of water in the Hetch Hetchy Valley, for instance, in case it should be used as a part of the water system, or the Lake Eleanor basin, has not been incorporated.

Mr. LONG.—Mr. Secretary, as I understand it, the scope of the examination is limited to Lake Eleanor and the Hetch Hetchy.

The SECRETARY.—No, sir; that is not the scope

of the investigation. The scope of the investigation here proposed is as follows:

Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and the watershed contributary, or which may be made contributary thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities, without the inclusion of the Hetch Hetchy Valley as a part of said sources of supply, and whether it is necessary to include said Hetch Hetchy Valley as a source of municipal supply for said City and County of San Francisco and bay cities.

Mr. LONG.—It comes outside of the permit of May 11?

Mr. SECRETARY.—Yes. In other words, we want to know what is necessary here as far as the Hetch Hetchy Valley is concerned. If we are up to the question of elimination, the question the Government wants to know and the question the American people want to know is whether it is a matter of absolute necessity for the people of that city to have this source of water supply; otherwise, it belongs to the people for the purpose for which it has been set aside.

Mr. LONG.—This is an enlargement of your original order to show cause?

The SECRETARY.—It is not necessarily an en-

largement of it, for if you will examine the order to show cause, it is necessarily implied, I think, that if the Hetch Hetchy Valley is not to be eliminated San Francisco must show that she has not other sources of water supply.

Mr. LONG.—I simply want to know that there is no check on Lake Eleanor or the plans already formulated.

The SECRETARY.—As I understand, the Advisory Board of Army Engineers see no reason why they should not proceed. **[98]**

Mr. LONG.—We have authorized a bond issue of $45,000,000 for the development of the Lake Eleanor system.''

Counsel for the plaintiff then read to the jury the following letter from the Advisory Board of Army Engineers to the Secretary of the Interior as set forth in the aforesaid certified copy of the proceedings before the Secretary of the Interior, in re use of Hetch Hetchy Reservoir Site

[Letter, Dated May 27, 1910, from Army Engineers to Secretary of Interior.]

''Washington, D. C., May 27, 1910.

Sir: For the purpose of carrying out the examinations and investigations directed by your order of the 27th instant, addressed to the mayor and supervisors of the City and County of San Francisco, State of California, directing the submission of additional data relative to the available water supplies for San Francisco, the Board of Advisory Engineers recommends that it be authorized to establish at San Francisco an office under the direction of the

member of the board station at San Francisco, to which the data as obtained and submitted by the City and County of San Francisco and all parties interested shall be sent, and to employ such clerical and technical assistants as may be necessary, in addition to those that may be furnished by the Department of the Interior.

For these purposes and to procure such independent data and information as in the opinion of the board may be necessary and to make the necessary personal examinations, it is estimated that $12,000 will be required.

Respectfully submitted,

JOHN BIDDLE,
Lieut. Col., Corps of Engineers,
HARRY TAYLOR,
Lieut. Col., Corps of Engineers,
SPENCER CROSBY,
Major, Corps of Engineers, Colonel, U. S. Army.

The Secretary of the Interior."

Counsel for plaintiff thereupon offered in evidence a certified copy of the order dated May 27, 1910, in the matter of the permit of May 11, 1908. Said order reads as follows:

[Order, Dated May 27, 1910, of Secretary of Interior, Re Permit of May 11, 1908.]

"THE SECRETARY OF THE INTERIOR,
WASHINGTON.

O L 12–13–3A

ORDER, IN THE MATTER OF THE PERMIT OF MAY 11, 1908, TO SAN FRANCISCO, RELATING TO THE HETCH HETCHY VALLEY. **[99]**

In the matter of the order directed by the Secretary of the Interior to the Mayor and Supervisors of the City and County of San Francisco, State of California, on February 25, 1910, to show cause why the Hetch Hetchy Valley and reservoir site should not be eliminated from the permit to said city of date May 11, 1908;

The above-entitled matter having come on regularly to be heard on the 25th day of May, 1910, at the hour of 10 o'clock A. M., and said City and County of San Francisco having, through its representatives, applied for a continuance of said hearing and for further time within which to more fully respond to said order, said application being made upon the ground that sufficient data was not available upon which to make showing responsive to said order, and an adjournment to Thursday morning, May 26, at 10 o'clock A. M., having been taken to permit the Advisory Board of Army Engineers to confer with the engineers representing the several parties interested herein respecting said application and the propriety of granting the same, whereupon the matter of said

application for continuance and postponement having been duly and fully considered by the Secretary of the Interior and said Advisory Board of Army Engineers, said board having recommended the same in writing,

It is hereby ordered that said City and County of San Francisco be, and it is hereby, granted to and including the first day of June, 1911, within which to respond to said order to show cause, and that hearing upon said order be, and it is hereby, continued until the hour of 10 o'clock A. M. on said last mentioned date.

Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and the watershed contributary, or which may be made contributary, thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities without the inclusion of the Hetch Hetchy Valley is a part of said sources of supply, and whether it is necessary to include said Hetch Hetchy Valley as a source of municipal water supply for said City and County of San Francisco and bay cities.

In granting said postponement and continuance it is understood said City and County of San Francisco will at once proceed, at its own expense and with due diligence, to secure and furnish to said Advisory Board of Army Engineers all necessary data

upon which to make the determination aforesaid, and pending the hearing upon said order to show cause no attempt shall be made by said city or any of its officers or agents to acquire, as against the United States, any other or different rights to the Hetch Hetchy Valley than it now has under said permit, and that no effort shall [100] be made by said city to develop said Hetch Hetchy Valley site.

Said Advisory Board of Army Engineers is hereby authorized to procure such independent data and information as it may deem necessary or proper to a full and complete determination of the matters committed to said board and the Secretary of the Interior for determination, and that said board may call upon the Geological Survey or other bureaus of the Department of the Interior for such assistance as any such bureau may be able to render in the premises.

It is further understood that said city will, as soon as practicable, submit to said advisory board a full exhibition of its proposed plan of development and utilization of water under said permit, together with estimates of the cost thereof, and also a full statement of all outstanding water rights, both for irrigation, power, and other uses, on the Tuolumne River and Lake Eleanor basins, and the proposed method of providing for the protection thereof.

All questions as to the validity and legality of said permit of date May 11, 1908, are hereby expressly reserved for decision and determination until said final hearing.

Dated this 27th day of May, 1910.

R. A. BALLINGER,
Secretary of the Interior.

May 28/10, Letter to Hon. S. M. Stockstage, copy for the City of San Fransico.

May 28/10, Letter to Col. Biddle encl. copy."

The plaintiff then offered and there was admitted in evidence certified copies of various letters between the then Secretary of the Interior and the City and County of San Francisco in the nature of applications and orders of the continuance from time to time of the aforesaid order to show cause, which said letters show that said order to show cause was continued from time to time by the Secretary of the Interior with the understanding that the terms and conditions of the order of May 27, 1910, were in no particular modified or changed. Evidence was then introduced to the effect that the hearing upon the aforesaid order to show cause was held before the then Secretary of the Interior of the United States on November 25th, 26th, 27th, 28th, 29th and 30th, 1912. **[101]**

Counsel for the plaintiff thereupon offered in evidence a certified copy of a letter from Walter L. Fischer, Secretary of the Interior, to the Mayor and Board of Supervisors of the City and County of San Francisco, State of California, dated March 1, 1913. In said letter the Secretary of the Interior refused to take any official action upon the report of the Advisory Board of Army Engineers or upon the reports or data furnished by the City and County of San Francisco in response to the afore-

said order to show cause, and on the ground, among others, that the Congress of the United States possessed the exclusive power and jurisdiction to grant irrevocable rights of way and franchises snch as were included in the said Garfield permit. Evidence was next introduced on behalf of the plaintiff to the effect that on April 17, 1913, the Congress of the United States convened in its First and Special Session of the Sixty-third Congress, and that at various times in 1913, during said special session of Congress, the Public Lands Committee of the House of Representatives of the United States and the Public Lands Committee of the Senate of the United States had held public hearings upon bills pending before said respective houses having for their object the granting to the City and County of San Francsico of a right of way and franchise to use the Hetch Hetchy Dam and Reservoir Site in behalf of developing a source of domestic water supply.

The witness, Eugene J. Sullivan, thereupon testified that he was the Sullivan referred to in an article published in a special Washington edition of the San Francisco "Examiner," dated December 2d, 1913. Thereupon the plaintiff offered and there was received in evidence copy of said special Washington edition of said San Francisco "Examiner," dated December 2d, 1913, from which the following portion was read to the jury: **[102]**

[Extracts from Washington Edition of San Francisco "Examiner" Dated December 2, 1913.]

"CONGRESSMAN KENT CHAMPIONS RIGHTS OF A MILLION PEOPLE.

Leader Among Conservationists. He attacks the Unfair Methods of Opposition to Hetch Hetchy Plan.

William Kent, congressman from California, has long been recognized as a practical conservationist.

His conservation policy took so practical a turn that he bought and gave to the people of his State and of the world the beautiful 'Muir Woods' in Marin county, Cal.

This wonderful grove of primitive redwoods—sequoia sempervirens—he rescued from private greed and made one of the notable public parks of the country.

It was Mr. Kent, too, who bought and established Hull House for Jane Addams in Chicago. And this is what such a conservationist has to say, of the great 'job' by which San Francisco is to get pure water from Hetch Hetchy and of the sort of opposition the bill has been subjected to.

In testifying before the Senate Committee on Public Lands on September 24 last, Congressman Kent said sharply:

RESENTS SUCH CRITICISM.

'I am rather inclined to resent the criticism that we who stand for this bill are opposed to conservation. I have tried to be an honest exponent of sane and sensible conservation, and to further the use of

our national resources without unnecessary waste.

> 'But when an opportunity comes to give to a great community upward of 200,000 horsepower upon which not a cent of private profit shall ever be made; when it comes to the question of benefiting upward of a million people, then I believe that conservation demands that I do my duty and try to help rather than to hinder such a worthy project.'
>
> '"I have heard it said right along," Mr. Whitman said in the hearings in the House, "you will find it is largely a question of water power."

'I admit that. I want the people of the cities of California; I want the irrigationists and the people of San Joaquin valley to be forever free from any danger of being held up in the interest of private profit, if that can be done.

TO SEE AND TO USE.

'Mr. Underwood Johnson expressed great confidence in his knowledge of the purposes of the Creator in the matter of this valley. I do not know whether we can take it that he is absolutely sure of being right. He made the statement that those wonders were put there to be looked at. How are we going to tell what things are there to be looked at and what things [103] are there to be used? It seems reasonable to me that we should use the useful things and look at the beautiful things; and that the highest use of the useful things is their use for the benefit of humanity.

'I made the statement in the House that if Nia-

gara Falls could be used to lighten the burdens of the overworked, I should be willing to see those falls harnessed. I would not be willing to see them harnessed for private profit, but if Niagara Falls could be utilized for the alleviation of overworked suffering humanity, I should like to see the falls used for that purpose. That is the kind of a conservationist I am, and I put it in the rawest, baldest terms.

THIEF WITH THE NATURE LOVERS.

'That is the purpose of the Almighty, it seems to me. I do not think people should be so sure of the purposes of the Almighty. I do not believe people should be so ready to asperse the methods of other people.

> 'I think it is time that the members of Congress who have tentatively committed themselves to measures of this kind should stand up and talk back a little bit.
>
> I want to state here and now that I have read this literature put out by these people. It has only one foundation of fact and that foundation is the letters of this man Sullivan, whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary.

'We proved his claims to be absolutely valueless; that he issued $250,000 of bonds on this alternative scheme that were really worthless. Every clipping I get from the public press—and I get lots of them—has this same foundation of falsity, and I am very glad to have the opportunity to express my opinion of that kind of a propaganda.' "

The foregoing article appeared on page 6 of said Washington Edition of the San Francisco Examiner of Tuesday, December 2d, 1913.

There was also read to the jury the following article appearing on page 7 of said paper:

"INSPIRATION OF OPPOSITION.

During the Senate committee hearing it came out that much of the inspiration for gross and careless aspersions made on the city of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply [104] to sell to San Francisco.

But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston."

Thereupon the witness Sullivan testified that he met the plaintiff Aston in the spring of 1913. At that time plaintiff stated to the witness that he had certain parties who would purchase the properties of the Sierra Blue Lakes Water and Power Company, and that plaintiff mentioned the name of Mr. Wilsey of Portland as one of such parties; that the meeting with the plaintiff on that occasion resulted in the commission agreement between the witness on behalf of the Sierra Blue Lakes Water and Power Company and the plaintiff, relating to the sale of the properties of the company. The letter was

thereupon offered and received in evidence and reads as follows:

[Letter, Dated March 10, 1913, from Eugene J. Sullivan to Taggart Aston.]

"San Francisco, Cal. March 10, 1913.

"Mr. Taggart Aston, C. E.,
Foxcroft Bldg.,
City.

Dear Sir:—

In the event of any business being done by our Company with Mr. Wilsey, we will pay you a commission of ten per cent on the amount received to be paid as received and in kind.

This is not an option of the Company's properties but it protects you in case any business is done through Mr. Wilsey.

Sincerely yours,
EUGENE J. SULLIVAN,
President Sierra Blue Lakes Water & Power Co."

The witness stated that the arrangement evidenced by the letter was the only arrangement he had with Mr. Aston at any time. The witness testified that he knew that plaintiff Aston went upon the company's properties on an engineering expedition [105] later in May, 1913, but that he was not at that time in the employ of the witness nor of the Sierra Blue Lakes Water and Power Company. The witness next testified that on or about June 22, 1913, he had represented to the Public Lands Committee of the House of Representatives of the United States that a report had been suppressed by the City of San Francisco concerning the availabil-

ity of the Mokelumne source as a water supply for San Francisco. The witness thereupon identified a copy of a telegram shown to him as copy of a telegram sent by him to the Honorable Scott Ferris, Chairman of the Public Lands Committee of the House of Representatives, and further testified that said telegram was prepared by the plaintiff and was signed and sent by the witness at the instigation of the plaintiff. Said telegram is in words and figures as follows:

[Telegram, Dated June 22, 1913, from Eugene J. Sullivan to Scott Ferris.]

"June 22d, 1913.

Re House Bill on Hetch Hetchy.

Hon. Scott Ferris, Chairman, Public Lands Committee, House of Representatives, Washington, D. C.

Re Raker Bill on Hetch Hetchy—our Consulting Engineer, Mr. Taggart Aston reports to us as follows:—

'As result of investigations by myself and staff during past few weeks I find Upper Mokelumne River Catchments and proposed storage reservoirs capable of economically developing in dryest periods at least 350 Million gallons per day of pure mountain water for San Francisco all taken from above 2200 feet altitude. Through fortunate circumstances I find that City has suppressed report elaborately and carefully prepared by their engineers on Mokelumne project which definitely proves they knew that this source would supply city's needs. Mr. Freeman made no personal examination of this

source—both he and the Army Engineers accepted and based their findings on biased and falsely represented data supplied by the City. I feel satisfied that Mr. Freeman, an Engineer of eminence and high reputation, would have examined personally and probably recommended Mokelumne **[106]** project had the Army Engineers and public not been grossly deceived and supplied with inaccurate information regarding it. As they and the Nation are entitled to assume that the National Park should not be destroyed unless as a matter of absolute necessity.

In addition to Mokelumne Supply there is available from Lake Eleanor and Cherry Creek 118 million gallons per day and from Spring Valley Company 140 milliom gallons per day, or total of 608 million gallons per day capable of supplying San Francisco and Bay Cities for next one hundred and eighty years without Hetch Hètchy. There is absolutely no public need for City to rush Hetch Hetchy inquiry as Lake Eleanor, Cherry Creek and Spring Valley alone can furnish supply for next seventy years. San Francisco now only using 35 million gallons per day.

Judging by my late investigations and new evidence unearthed, I consider Hetch Hetchy matter will prove great public scandal. Rigid inquiry should be held and Committee should call for City Engineers Bartell's and Manson's suppressed report of April, 1912. My plans and data will not be complete for five weeks yet, will consider it a duty to submit proofs to Congressional Committee then.'

Report ends. In view of above report we would respectfully ask your Committee to delay granting of Hetch Hetchy until our data has been presented. Kindly let Secretary of Interior and members of Committee have copies of this telegram.

EUGENE J. SULLIVAN,

President Sierra Blue Lakes Water & Power Co."

Counsel for the plaintiff then offered and there was [107] received in evidence a certified copy of the proceedings before the Committee on the Public Lands of the House of Representatives, Sixty-third Congress, First Session, on H. R. 6281, being the bill granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, and read to the jury the following telegram admitted by the witness to have been sent by him to Honorable Scott Ferris, Chairman of the Committee on Public Lands:

[Telegram, Dated June 27, 1913, from Eugene J. Sullivan to Scott Ferris.]

"San Francisco, Cal., June 27, 1913.

Hon. Scott Ferris, Chairman Committee on Public Lands, Washington, D. C.

Sir: Regarding your letter of 19th instant, absolutely no water shortage here. Such allegations are framed for political purposes. No need for haste in Hetch Hetchy matter. City officials are merely deceiving your committee as they have already received Mr. Freeman and Army board. We shall have unfortunate scandal. Army board accepted city's false data in good faith but did not give sufficient time for personal investigation. Respect-

fully ask time to complete data and present proof to your committee. Please consider this an official communication.

EUGENE J. SULLIVAN,
President Sierra Blue Lakes Water and Power Co."

Counsel further read the reply of said Scott Ferris to said telegram, which said telegram is in words and figures as follows:

[Telegram, Dated June 28, 1913, from Scott Ferris to Eugene J. Sullivan.]

"June 28, 1913.

Hon. Eugene J. Sullivan, President Sierra Blue Lakes Water & Power Co., San Francisco, Cal.

Telegram received. If you know of any scandal in existence or any that is probable to arise, please have some Representative in Congress or other reliable person communicate it to us so the committee may have the benefit of it. We will welcome any information you have at hand along this line.

SCOTT FERRIS,
Chairman."

The following telegrams contained in said certified [108] copy of the proceedings before said Public Lands Committee were also read to the jury, it being admitted that said telegrams were sent to the persons and by the persons to whom and by whom they purport to have been sent:

[Telegram, Dated June 14, 1913, from Taggart Aston to William Kent.]

"San Francisco, June 14, 1913.

Hon. William Kent,
House of Representatives,
Washington, D. C.:

Having been appointed as cousulting engineer by Sierra Blue Lakes Water & Power Co. to investigate their Mokelumne River proposed water supply, I find that they will have available for San Francisco an economically developed supply of pure mountain water of at least 350,000,000 gallons per day. The city engineer's office have been aware of this, but seem to have mysterious prejudice in favor of Hetch Hetchy, and have not put forward the Mokelumne supply in its true and favorable light. My opinion, their report is unfair. I am preparing and shall have full data in few weeks that will prove granting of Hetch Hetchy unnecessary and against public interest, and that Mokelumne River upper catchments can fully supply San Francisco and bay regions for next century at least. Having investigated carefully and conservatively I give you my personal assurance as to this, and will furnish proofs.

My clients ask that committee defer action on Hetch Hetchy for six weeks until their full data can be presented.

TAGGART ASTON,
Foxcroft Building, San Francisco."

It was admitted that in addition to the foregoing telegrams the following communications were sent

by and received by the persons to whom and by whom they purport to have been received and sent:

"San Francisco, May 28, 1913.

[Letter, Dated May 28, 1913, from Sierra Blue Lakes Water & Power Co. to Committee on Public Lands.]

"San Francisco, May 28, 1913.

Committee on Public Lands,
House of Representatives,
Washington, D. C.

Gentlemen: [109]

We learn by the public press that certain agents of San Francisco are now at Washington endeavoring to rush at this extra session of Congress a bill for a reservoir site in the Hetch Hetchy Valley, Yosemite National Park.

Before your Honorable Committee passes upon the question we respectfully ask that representatives of our Company be given a hearing, as we are prepared to show that San Francisco can obtain an adequate and immediate water supply from the sources of the Blue Lakes and Mokelumne Rivers and without molesting in any way a National Park, without interference with the rights of the irrigationist or of Turlock and Modesto Districts of this state, and at a saving to the city of many millions of dollars in construction.

In order that a proper and complete presentation of the facts can be made by the representatives of our company, we respectfully petition your Honorable Committee to postpone said hearing until the

next regular session of Congress.

Respectfully,

SIERRA BLUE LAKES WATER & POWER CO."

[Telegram, Dated June 9, 1913, from Sierra Blue Lakes Water & Power Co. to Scott Ferris.]

"San Francisco, Calif., 9th June, 1913.

Hon. Scott Ferris, Chairman, Public Lands Committee, House Representatives, Washington, D. C.

Our engineers are preparing a detailed report showing that the Blue Lakes and the Mokelumne River can supply San Francisco with an adequate and immediate water supply. Will your Committee extend time to receive their report?

SIERRA BLUE LAKES WATER & POWER CO."

Per ENGENE J. SULLIVAN,

Prest."

[Letter, Dated June 24, 1913, from T. Aston to Scott Ferris.]

"To the Hon. Scott Ferris, Chairman, Public Lands Committe, Washington, D. C.

Re Mokelumne River Proposed Sources of Water Supply to the City of San Francisco and Bay Cities.

My dear Sir: As requested in your telegram to me of yesterday. I have the honor to write you as follows:

Up to within five weeks ago I had no connection with any of the proposed sources of supply to San

Francisco. Such knowledge as I possessed was derived from the reading of printed matter for and against the various proposed sources. The Hetch Hetchy reports impressed me as inconsistent and extremely prejudiced in favor of that project and as not doing justice to other sources; this is also the view held by many Western Engineers.

I had also read literature published by the Sierra Blue Lakes Water & Power Company, some of whose claims I now find have been rated somewhat high, due to their having had insufficient data. I was appointed by the Sierra Blue Lakes Water & Power Company, and allied interests, some few weeks ago to make an examination and report on the Mokelumne River Upper Catchment as a source of Hydro-Electric Power and Water Supply. I have found there was a considerable divergence between the amount of supply claimed by my clients and that which the City's Engineers in their *published reports* said was available—and that they also differed on the question of cost and amount of storage capacity. Regarding the latter, there was a wide difference of figures and neither party were in possession of sufficiently accurate data from which to obtain approximately correct figures; I therefore put a survey party in the field and have obtained results which [110] show that the Company were too high and the City too low in their estimates. I have also gone into and am still working on estimates of cost and hope to have my data in a sufficiently finished condition to present to your Committee within six week's time. As the result of my examination

up to the present time, I can assert:—

1. That 350 million gallons of pure mountain water can be economically supplied to San Francisco from 430 square miles of Mokelumne River Upper Catchment, at elevations between 2200 and 10,000 feet.

2. That the cost of developing this supply will be much less than that of the Hetch Hetchy project.

3. That this supply *alone* will be sufficient for San Francisco and Bay Cities' needs for next century.

4. That this supply combined with Spring Valley and Lake Eleanor will supply San Francisco and Bay Cities for 180 years.

5. That it can be developed from storage which will not conflict with any irrigation interest, or with the use, by the Nation, of the National Park at Hetch Hetchy.

6. That it will give the people of San Francisco as pure a Mountain Supply as Hetch Hetchy—and will not involve nearly as large an initial expenditure of certain works as proposed for Hetch Hetchy, many of which will be useless for City supply for some seventy years, and upon which the rate payers of San Francisco will have to pay fixed charges amounting to several times the original cost before they come into use.

7. That from 90,000 to 100,000 continuous H. P. or 140,000 to 160,000 salable H. P. will be economically available for Municipal purposes from the fall on the Mokelumne River proposed conduits. That the city, instead of having to supply Hydro-Electric

Power free, as they will have to do to irrigationists in the Hetch Hetchy project, would obtain from the Hydro-Electric Power on the Mokelumne River a gross annual revenue of from $5,000,000 to $6,500,000 or sufficient to at least pay the fixed charges on the cost of installing the whole supply as well as the purchase of the Spring Valley System.

You will note from Mr. Freman's report that he states he did not make any personal examination of this important source (which is the nearest and most economical for a supply to San Francisco) because I quote his own words (page 160e of his report) 'That an inspection of the large scale map makes plain the fact that all of the advantages of dam site, length and aqueduct, quality of storage reservoir, future water possibilities, and the great advantage of not having to seek some additional source, at a time when sources equal to those now available [111] are impossible to obtain, are all so plainly and strongly on the side of the Hetch Hetchy and upper Tuolumne that I do not believe it advisable to extend the $15,000 to $30,000 more or less, which explorations and complete surveys for thoroughly working out the best possible project for a Municipal water supply from Mokelumne would cost.''

Now an Engineer of Mr. Freeman's eminence may be able to draw his conclusions, on such an important matter as the future Water Supply to San Francisco, from a large scale map, but the writer has never yet met any other Engineer (and my experience with large City Supplies has extended over

20 years and has been world wide) who could arrive at such important conclusions in this manner.

This statement is quite on a par with another of Mr. Freeman's conclusions (page 134 his report Clause 149a) in which he recommends certain expensive constructions—'more for its psychological effect on the public than for any sound engineering reason.' And I may state that it is the general opinion amongst Engineers that the above statement is true of most of his findings.

I am sure that my surprise and indignation will be shared by you and your Committee, and the general public, when I state that the City suppressed a carefully considered report by the City Engineers Bartell and Manson, in April, 1912, in which they stated that an amount of water approximately what we claim could be suppiled to San Francisco, and that the Mokelumne Source combined with Lake Eleanor was sufficient for San Francisco and the Bay Cities requirements—and that there was substituted a report by Engineer Grunsky (acting on behalf of the City and at the bequest of the City Officials) a report which states that only 60 million gallons was available.

I am sure that this act of trickery should prompt your Committee to grant opportunity and time for the most rigid inquiry. As in ordinary business life this might be termed 'the City's attempt to loot the Nation of Hetch Hetchy under false pretenses.'

I have asked Mr. Wadsworth, who prepared the Army Engineers case, if he had been given the Manson report as part of the data which the City pre-

sented and he informed me that he was not aware there was such a report.

I would respectfully suggest that your Committee call for it. I am prepared to prove its existence.

Mr. Wadsworth, for the Army Board, made a short but able analysis of the Mokelumne project—he proved the existence of the amount of supply claimed for but swallowed it up in 'compensation' water. My clients will be able to prove his information regarding the amount of 'priorities' or 'compensation' water to have been made on incorrect information supplied to him, and that the amount of 350 million gallons per day can be supplied as I have before asserted. We feel sure that had the Army Engineers [112] of Mr. Freeman devoted to the Mokelumne project the time and money (which would only have been a moiety of that devoted to Hetch Hetchy) that they could not have failed to recommend it.

My clients understand that the City Officials are endeavoring to rush the Hetch Hetchy grant, but we feel sure that your Committee's sense of duty to the Nation will not permit this, but that ample opportunity will be given them, and also the proponents of other sources to prove their cases, the more especially as we now definitely know that the sentiment in favor of Hetch Hetchy has grown out of false assumptions and has been fostered by gross deception of Congress and the public. And I feel sure that your Committee will not sanction the insult to the Army Board or to your own intelligence in this suppression of certain data and the presentation of

biased data, which has been characteristic of the City Officials.

There is no public call for haste in granting of Hetch Hetchy. I therefore trust your Committee will give my clients the opportunity to present our case in an endeavor, with advantage, to save the National Park for the Public. Should you not find it advisable to do so, we shall deem it unfortunate.

Kindly consider this communication and my report contained in Mr. Sullivan's telegram to you of June 22d, as a public communication to your Committee on behalf of my clients.

Very respectfully yours,

T. ASTON.

T. A. D."

[Telegram, Dated June 28, 1913, from Scott Ferris to Eugene J. Sullivan.]

"June 28, 1913.

To Mr. Eugene J. Sullivan, Care, Sierra Blue Lakes Water & Power Co., San Francisco, California.

Since wiring you this morning it has been stated before the committee that you have a financial interest in Blue Lakes as a source of water supply and are now seeking delay in your own and your company's interest. If you have any evidence in support of your contentions and will come here and present it, the committee not close hearings until Monday, July seventh next to give you opportunity to produce it. Wire at once whether you will come and specify nature of your charges.

SCOTT FERRIS,
Chairman." **[113]**

[Telegram, Dated June 30, 1913, from Taggart Aston to Scott Ferris.]

"June 30th, 1913.

Hon. Scott Ferris,
Chairman, Public Lands Committee,
Washington, D. C.

We respectfully ask your committee to insist that the original copy of alleged suppressed report by Asst. City Engineer Bartell to City Engineer Manson, of April, 1912, on the Mokelumne River as a source of water supply for San Francisco be sent from San Francisco and tabled before your committee before July 7th.

TAGGART ASTON."

[Letter, Dated July 1, 1913, from Scott Ferris to Taggart Aston.]

"July 1, 1913.

Mr. Taggart Aston,
526 Foxcroft Building,
San Francisco,
California.

My dear Sir:

I beg to acknowledge receipt of your esteemed communication under date of June 24th with reference to the San Francisco water supply matter.

I presume you are aware of the recent developments regarding this legislation and it would be unnecessary for me to go into detail about it.

It is, however, true that it appears that every governmental officer interested in the matter as well as Honorable Gifford Pinchot is of the opinion that

the Hetch Hetchy proposition would be the most economical as well as the most feasible proposition.

I am glad to get your comments and suggestions, however, and I assure you that no action will be taken on the bill until every phase of it has been gone over by the Committee.

Very sincerely yours,

SCOTT FERRIS." [114]

[Letter, Dated July 2, 1915, from Taggart Aston to Scott Ferris.]

"July 2d, 1913.

To the Hon. Scott Ferris, Chairman, Public Lands Committee, Washington, D. C.

My dear Sir:

In reply to your telegram of yesterday, I very much regret my inability to appear before your committee on July 7th.

The cause of my being unable to do so is, I beg to assure you, quite beyond my personal control.

I am,

Very respectfully yours,

TAGGART ASTON."

[Telegram, Dated July 6, 1913, from Taggart Aston to Scott Ferris.]

"July 6th, '13.

Hon. Scott Ferris,

Chairman, Public Lands Committe,

Washington, D. C.

I prepared, instigated, and am responsible for all statements and charges made by Eugene J. Sullivan in his telegrams to you. Spring Valley's sworn

statement to City Officials for month of May this year shows four hundred days supply stored in their reservoirs for San Francisco. There is also over four hundred days additional supply available from their underground gravel supply, or some two and half years water supply on hand even if no rain fell meantime. Therefore City officials plea of shortage to your Committee is not 'bona fide' and undoubtedly has been intended to grossly deceive you for purpose of rushing Hetch Hetchy bill through extra session. On account of City's Service distributing pipes being insufficient Spring Valley Co. have issued notices not to waste water. Referring to my letter to you of June 23d, H. H. Wadsworth, who prepared Army Board's reports on Hetch Hetchy makes written statement that Bartell-Manson suppressed report on Mokelumne Supply was never seen or heard of by him.

In justice to the American people and to your Committee time asked for should be allowed for me to demonstrate the truth of the claims I set forth in my letter of June 23d.

TAGGART ASTON."

[Letter, Dated July 8, 1913, from Scott Ferris to Taggart Aston.]

"July 8, 1913.

Mr. Taggart Aston,
526 Foxcroft Building,
San Francisco.

My dear Sir:

Replying to your esteemed communication of July 2, and regretting your inability to be present before

the Committee on July 7th in connection with the [115] San Francisco water supply matter, beg to say, I also regret no little that you were unable to be present at that time. The hearings closed on July 7th after Eugene J. Sullivan had presented his views to the Committee. The future procedure of the Committee will be take the bill up, read it section by section and take some action thereon. I must respectfully suggest, however, that if requested, opportunity will be afforded interested parties to present their views to the Committee at the Senate end of the Capitol when the bill comes up before that body for consideration.

Very sincerely yours,

SCOTT FERRIS."

[Letter, Dated July 8, 1913, from Taggart Aston to Scott Ferris.]

"San Francisco, July 8th, 1913.

To the Hon. Scott Ferris, Chairman, Public Lands Committee, Washington, D. C.

My dear Sir:

With reference to Mr. Eugene J. Sullivan's evidence before your Committee on the 7th inst., I may state that his associates and myself endeavored to dissuade him from going to Washington, knowing him to be a man with a grievance and liable to bring extraneous matter into his evidence. Upon his insisting to proceed, my clients, who had engaged me as a Consulting Engineer to report on the Mokelumne source and advise his company, considerately refused to permit me to appear before your Committee. We are not in sympathy with his

method of giving evidence, neither do we approve of his unnecessary abuse of individuals.

I may explain that I am not Mr. Sullivan's engineer as he has spoken of me, but engaged by others to advise his Company. However, certain essential facts remain as outlined in my letter to you, dated June 24th.

I have advisedly called the Bartel-Manson's report a 'suppressed report,' and in explanation thereof, hereunder inform you as to how I came to know of it. I sent in a note to Mr. O'Shaughnessy, the City Engineer of San Francisco, on the day he left for Washington (early in June), asking him to permit me to obtain from his draughting department copies of reservoir plans of the Mokelumne River project and other data, as I had been engaged to prepare a report thereon. He sent his Clerk with me to the Chief Draughtsman, Mr. Jones; the latter told me that the plans were locked up and asked me to call again. I called several times with a like result and was thus led to suspect that the officials were endeavoring to avoid giving me access to this data. On June 13th, I telephoned and an Assistant replied that both Mr. Jones and Mr. Bartel, who were in charge, were out of town for some days, but asked me to call, which I did on [116] the following morning when I saw this assistant, who was apparently unsophisticated and innocent as to any intrigue on the part of his superiors to delay me in getting access to the data desired. I asked for copies of the North Fork and Railroad Flat Reservoirs plans, but this assistant, apparently consider-

ing me of more importance than I am sure my appearance justified, pulled out a mass of maps and data connected with the Mokelumne Source, and from the innermost recesses of the drawer produced a report by Mr. Bartel and Mr. Manson, on the back of which I was surprised to find thirteen elaborately prepared plans and diagrams, all relative to the Mokelumne project. As I had never heard of such report or plans before, I looked over the report and was still further surprised to notice that its findings conceded the Mokelumne to have a Water Supply sufficient for the needs of San Francisco for the next hundred years, at least. I at once took the determination to expose the deception of the public and Army Board which the suppression of this report entailed. I asked the assistant for the negatives of all the plans filed at the back of the report, and also for the report for the purpose of having copies made. He handed me these without demur, and I gave him a receipt for them. I at once went to the blueprinters and had the report and plans photographed. Upon returning to my office some hours later my assistants informed me that the City Engineer's department had sent an official to my office threatening to inform the police if the report was not returned forthwith, and stating it was a document which was not supposed to be seen, and that the Assistant who let me see it would get into serious trouble for so doing. I at once phoned to the City Engineer's office and expressed myself in indignant terms with regard to the attempt to withhold public documents. But on being informed that certain

officials would get into serious trouble, I at once sent the documents back, and wrote to Mr. Hunt, Ass't Engineer, asking to have the documents lent to me again. Several days later the City Engineer's Department phoned to me, and said I might have copies of plans. I sent my Chief Assistant to interview them. He requested to read the Bartel report but was not permitted to do so. The only concession made was to permit three unimportant plans out of thirteen to be sent to the blue printers.

When the Army Board was appointed it was conceded that a fair deal would be given all parties, although there were misgivings owing to the fact that the money voted was insufficient and the time too short to permit of them preparing reliable data themselves, and having to depend on data prepared by the City Engineers, who notoriously favored Hetch Hetchy.

Now I have a great deal of sympathy with the proponents of the Mokelumne projects; if their bonds have deteriorated in value it is largely on account of misrepresentations made by the City Engineers regarding their project, and owing to the fact that [117] more honest reports favoring them have been suppressed.

Eugene J. Sullivan is only a unit amongst many interested in this property, and these people, as it now turns out, have not been given a 'dog's change.' A grave injustice has been done them in the various reports made against their properties, and in the suppression of report favoring them. We therefore feel that a Commission should be appointed to take

evidence in this matter, and that justice should finally be done. The public rely on your committee to see to this. I feel that what I say is right and I shall continue to fight for it.

I am,

Very respectfully yours,

TAGGART ASTON.

P. S. Kindly consider all my correspondence as official and public. T. A."

[Letter, Dated July 15, 1913, from Scott Ferris to Taggart Aston.]

"July 15, 1913.

Mr. Taggart Aston,
San Francisco, California.

My dear Sir:

Your esteemed communication of recent date is before me, and I note carefully what you say.

I will be glad to confer with the California delegation regarding the matters referred to in that letter.

Very sincerely yours,

SCOTT FERRIS."

[Letter, Dated July 31, 1913, from Scott Ferris to Taggart Aston.]

"July 31, 1913.

Mr. Taggart Aston,
Foxcroft Building,
San Francisco, California.

My dear Sir:

Referring to our recent correspondence regarding the Hetch Hetchy bill, beg to say, the features commented on by you, together with the entire corres-

pondence, was called to the attention of the committee at its last meeting on July 30th.

SCOTT FERRIS." [118]

Thereupon there was read from a vertified copy of the proceedings of the Public Lands Committee of the House of Representatives, a colluquy which occurred between the members of the committee on June 28, 1913, with respect to the form of telegram that should be sent to Eugene J. Sullivan, whereupon the following telegram was drafted by the committee and sent:

[Telegram of June 28, 1913, from Public Lands Committee to Eugene J. Sullivan.]

Since wiring you this morning it has been stated before the committee that you have financial interests in the Blue Lakes as source of water supply, and are now seeking delay in your own and your company's interest. If you have any evidence in support of conspiracy charge, committee will delay matter until Monday, July 7 next, to give you a chance to produce it. Reply at once."

Said proceedings further show that thereupon the following occurred:

[Extract from Proceedings of Public Lands Committee.]

"Mr. DECKER.—As far as I am personally concerned I want my position to be understood. I would be willing to take the statements of Mr. Nolan, Mr. Kahn, and these other gentlemen, and not believe this man out there, because we have been reading in the papers for the last 12 years that they are short of water in San Francisco. Mr. Pinchot, I

believe, mentioned the fact that they need water out there, and the Forestry Service, and Mr. Lane, who has some standing in California, testified in favor of this proposition. But this gentleman has made some statements; I do not look at them as charging a scandal; he has stated they do not need any water. That is a question of fact and not a question of scandal. He has made a charge, by inference, that the army board accepted false data from the city, and we can call the army board before us and question them more closely about how they got their information. But it looks to me as though there is no use in sending that telegram in a way which would indicate that he was discredited; he is an American citizen; he is out of jail; he stands unimpeached, and he has wired this committee and wants it to be treated officially, that he knows something about this subject, and my judgment would be that it is the duty of this committee to wire him that we will wait until July 7 to hear him and that we will hear him in full if he will come. That is my opinion about it." [119]

The witness Sullivan then testified that he received the telegram from the Chairman of the Public Lands Committee of the House of Representatives, notifying him that the meeting of said committee had been adjourned to July 7th, 1913, in order that the matters represented to said Committee by the plaintiff and others might be more fully heard. Further that he appeared before said Public Lands Committee on July 7, 1913, without the approval of the plaintiff, and that he went to Wash-

ington in answer to the notice of the adjourned meeting of said Public Lands Committee, for the purpose of removing aspersions cast upon the properties of the Blue Lakes Company and upon his own character. The witness further testified that Percy V. Long, City Attorney of the City and County of San Francisco, and M. M. O'Shaughnessy, City Engineer of the City and County of San Francisco, were present and participated in said hearing on July 7, 1913, on behalf of the City and County of San Francisco. Plaintiff then read to the jury the following extracts from the proceedings of said Committee on Public Lands of the House of Representatives, as shown by said certified copy thereof:

[Extract from Proceedings of Committee on Public Lands.]

"The CHAIRMAN.—Is Mr. Aston connected with the Sierra Blue Lakes Water and Power Company?

Mr. SULLIVAN.—Yes, sir; he is the consulting engineer.

The CHAIRMAN.—He is in the employ of the company?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Is he on a salary?

Mr. SULLIVAN.—Well, I would say contingent.

Mr. DECKER.—Contingent on what?

Mr. SULLIVAN.—He represents other people, who are about to negotiate for its sale.

Mr. DECKER.—His salary is contingent upon what? If it is contingent, what is it contingent

upon? Will he get his money whether the property is sold or not?

Mr. SULLIVAN.—Yes, sir.

Mr. DECKER.—You say it is contingent. Do you understand what contingent means? Contingent means that it depends upon something. What does it depend upon?

Mr. SULLIVAN.—Not on the sale to the city by any means.

Mr. DECKER.—Well, what is it contingent upon?

Mr. SULLIVAN.—I will correct that. His pay comes from the people who are negotiating for the property.

Mr. FRENCH.—Is he in the employ of your company?

Mr. SULLIVAN.—Yes, sir.

Mr. DECKER.—You are the president of the company?

Mr. SULLIVAN.—Yes, sir. [120]

Mr. DECKER.—Then you should know what he gets and where he is to get it from.

Mr. SULLIVAN.—I do.

Mr. DECKER.—How much is he going to get?

Mr. SULLIVAN,—Mr. Aston gets part of his expenses from our company and part paid by the people negotiating for the property, and he receives, I think, 10 per cent upon the sale.

Mr. DECKER.—His salary is contingent upon the sale of the property?

Mr. SULLIVAN.—But not to the city.

Mr. DECKER.—To anybody?

Mr. SULLIVAN.—Yes, sir.

Mr. DECKER.—He is not likely to sell it to anybody but the city?

Mr. SULLIVAN.—We are not looking particularly to San Francisco.

Mr. DECKER.—There are other cities?

Mr. SULLIVAN.—Yes, sir. . . .

The CHAIRMAN.—Mr. Aston is the engineer of the company of which you are the president and must have been under your control?

Mr. SULLIVAN.—No, sir, he also represents other interests, and I cannot say that he is entirely under my control.

The CHAIRMAN.—You are the president of the company, are you not?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—How much interest in that company do you own?

Mr. SULLIVAN.—I own 100 shares.

The CHAIRMAN.—What are the shares worth?

Mr. SULLIVAN.—I was offered for the property, two and a half years ago, $2,600,000.

The CHAIRMAN.—For the entire property?

Mr. SULLIVAN.—For the entire property.

The CHAIRMAN.—By whom was that offer made?

Mr. SULLIVAN.—By Mr. Scribner.

The CHAIRMAN.—By whom?

Mr. SULLIVAN.—By Mr. O. Scribner.

The CHAIRMAN.—Who is Mr. O. Scribner?

Mr. SULLIVAN.—He was formerly the general manager of the Associated Oil Co.

The CHAIRMAN.—For what purpose did he desire the property?

Mr. SULLIVAN.—He desired it for power and irrigation purposes, I should think.

The CHAIRMAN.—How many shares of stock were issued at the time you had this offer of $2,600,000?

Mr. SULLIVAN.—How many shares? The capital stock of the company is 7,500 shares.

The CHAIRMAN.—And you own 100 shares?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Did you own 100 shares at that time?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—What did you pay for those 100 shares? [121]

Mr. SULLIVAN.—Why, we organized the company.

The CHAIRMAN.—Is that all you had to do?

Mr. SULLIVAN.—We took over some property. The situation of the property is this: The property which was taken over was known as the Sierra Nevada Water & Power Co.

The CHAIRMAN.—What did you pay for it?

Mr. SULLIVAN.—There was a bond issue on that property of $1,250,000, and that is still against the property.

The CHAIRMAN.—So the property at this time is encumbered for how much?

Mr. SULLIVAN.—$1,250,000.

The CHAIRMAN.—Who holds these bonds?

Mr. SULLIVAN.—A great many people. And

besides that there is another property of our own known as the Blue Lakes property. There is no bond issue on that.

The CHAIRMAN.—How much actual cash did you put in that property yourself at any time or at all times?

Mr. SULLIVAN.—How much actual cash?

The CHAIRMAN.—Yes; for your 100 shares.

Mr. SULLIVAN.—Well, I think the property altogether stands me at about $100,000. . . .

The CHAIRMAN.—And you employed Mr. Taggart Aston as the engineer of your company, did you not?

Mr. SULLIVAN.—Mr. Aston was employed by a gentleman who represents some Englishmen; I can not call his name.

The CHAIRMAN.—Is he one of your company?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Who employed him to perform the services for your company that he is now performing?

Mr. SULLIVAN.—I did.

The CHAIRMAN.—You did?

Mr. SULLIVAN.—Yes, sir; I did.

The CHAIRMAN.—You employed Mr. Taggart Aston as the engineer of this company?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—What is the date of that employment?

Mr. SULLIVAN.—I cannot say offhand, but it was about two months ago.

The CHAIRMAN.—About two months ago you

employed Mr. Taggart Aston to serve this company in the capacity of engineer?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Was it before or after you telegraphed me here opposing this Hetch Hetchy plan?

Mr. SULLIVAN.—It was before.

The CHAIRMAN.—Have you a copy of your contract with Aston?

Mr. SULLIVAN.—Not with me.

The CHAIRMAN.—You agreed to give him 10 per cent of the entire proceeds of the sale of this property in the event a sale was made, did you not?

Mr. SULLIVAN.—If he made a sale to this English syndicate.

The CHAIRMAN.—Was he limited to the English syndicate?

Mr. SULLIVAN.—Yes, sir; that has been understood in all the talks I had with him. [122]

The CHAIRMAN.—Suppose that you could bring about a sale, or suppose Mr. Aston could bring about a sale, of this property to the City of San Francisco; you would have to pay him 10 per cent of the proceeds, would you not?

Mr. SULLIVAN.—I never had any bargain with him at all in regard to that. His commission was to be entirely on a sale to the English syndicate.

The CHAIRMAN.—Do you state now that Taggart Aston was only employed to sell this Blue Lakes property to one specific concern?

Mr. SULLIVAN.—I do.

The CHAIRMAN.—Are you sure you are correct about that?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Are you sure that he is not now in the employ of your company to bring about a sale of this property to the City of San Franicsco or anybody else he can?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—I have a letter from Mr. Taggart Aston in which he says he is in your employ and in the employ of your company. That appears in ever paragraph, that he is in the employ of you and your company.

Mr. SULLIVAN.—I so regard him. He is in my employ conjointly with this English syndicate.

The CHAIRMAN.—Is not Mr. Aston in your employ now and is it not a fact that you are now asking for a continuance of this hearing to the end that he may prepare and present data here for the specific purpose of defeating the Hetch Hetchy proposition and to aid in the sale of this property to the city?

Mr. SULLIVAN.—I would not say that.

The CHAIRMAN.—Well, how far is that from the fact?

Mr. SULLIVAN.—A good deal. I want to state that there is an available supply there, and this report has been suppressed, and if the army engineers had seen that report, I feel that their findings might have been different.

The CHAIRMAN.—For what reason could this committee or the City of San Francisco be interested in the Blue Lakes property, except for the pur-

pose of purchasing it for a water supply, and what other purpose could Mr. Aston have in trying to influence or bring about the adoption of that system by the City of San Francisco rather than the Hetch Hetchy supply?

Mr. SULLIVAN.—The proposition is this: If there is any other available supply without going to Hetch Hetchy, Congress ought to know it. . . .

The CHAIRMAN.—You are acquainted with Mr. Franklin K. Lane, are you not?

Mr. SULLIVAN.—Yes, sir; he is a fine man.

The CHAIRMAN.—You look upon him as a good and patriotic man?

Mr. SULLIVAN.—He is the finest man that ever left California.

The CHAIRMAN.—What would be your decision in the matter if you were told that Mr. Lane came before this [123] committee and told us emphatically and earnestly that there was no doubt whatever but that this was the best and most available water supply for San Francisco?

Mr. SULLIVAN.—As I have said, Mr. Phelan and Mr. Lane, in my judgment, based their opinions upon reports filed by Mr. Manson and Mr. Grunsky, which reports were false.

The CHAIRMAN.—Then, you do not allege that they are interested parties?

Mr. SULLIVAN.—No, sir; not at all; they are magnanimous men.

The CHAIRMAN.—You do not say that they are not acting in behalf of the general welfare?

Mr. SULLIVAN.—They are absolutely fair.

The CHAIRMAN.—What would you say about Mr. Pinchot? Do you regard Mr. Pinchot as a good man?

Mr. SULLIVAN.—I do not know him.

The CHAIRMAN.—Do you know of his reputation regarding water-power sites?

Mr. SULLIVAN.—I cannot say that I do.

The CHAIRMAN.—Do you know of his reputation concerning conservation generally?

Mr. SULLIVAN.—I cannot say that I do.

The CHAIRMAN.—Then you have no opinion as to whether the committee should give force and credence to his views on this matter?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Do you know Mr. George Otis Smith, the Director of the Geological Survey?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Then you do not care to express an opinion as to whether the committee should give weight and credence to his testimony on the subject?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Do you know Mr. F. H. Newell, the Director of the Reclamation Service?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Then you do not care to express an opinion as to what weight and credence the committee should give his views on the subject?

Mr. SULLIVAN.—No, sir.

The CHAIRMAN.—Do you know the head of the Forestry Service, Mr. Graves?

Mr. SULLIVAN.—I have heard of Mr. Graves.

The CHAIRMAN.—In your opinion, what weight and credence should the committee give his testimony in the matter?

Mr. SULLIVAN.—I do not know Mr. Graves, but I recall that a man who is very strong in the Forest Service made some statement to a friend of mine about the great value of this property. It strikes me that Mr. Graves stated that the power rights on this property were away up; I think he said they were worth $10,000,000, or something of that kind.

The CHAIRMAN.—Do you know the city engineer of San Francisco, Mr. O'Shaughnessy?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—You look upon him as a good man?

Mr. SULLIVAN.—Yes.

The CHAIRMAN.—Do you know Percy Long, the city attorney? [124]

Mr. SULLIVAN.—Yes; I know Mr. Long.

The CHAIRMAN.—How do you regard him?

Mr. SULLIVAN.—Well, personally he is a good fellow.

The CHAIRMAN.—Are you acquainted with the 11 Members of Congress from California?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Do you know all of them?

Mr. SULLIVAN.—I know them by reputation.

The CHAIRMAN.—How would you regard their statements before this committee?

Mr. SULLIVAN.—They are fine gentlemen, honorable men.

The CHAIRMAN.—How about Mr. Phelan?

You look upon him as a very prominent citizen of California, do you not?

Mr. SULLIVAN.—Yes, sir; I was associated with him in beating the combined bosses in the part of the city in which I lived in the year 1900.

The CHAIRMAN.—Do you know, as a matter of fact, that all of the men I have mentioned, basing their views upon reports and investigations of army engineers and civil engineers, have come before this committee and testified as to the necessity and feasibility of this project?

Mr. SULLIVAN.—In regard to Mr. Lane and Mr. Phelan, and possibly Mr. Long and the other gentlemen, in looking over the municipal reports of San Francisco for a number of years back, I find reports by Mr. Grunsky and Mr. Manson—

The CHAIRMAN.—(Interposing.) I prefer that you would not go off on that. I stated to you a simple question, whether or not you knew, as a matter of fact, that they had done that.

Mr. SULLIVAN.—I understand that they have favored Hetch Hetchy; yes, sir.

The CHAIRMAN.—Each and very one of them?

Mr. SULLIVAN.—Yes, sir.

The CHAIRMAN.—Has your opportunity to gather information and facts been superior to all of the gentlemen I have mentioned, including the 11 Members of Congress?

Mr. SULLIVAN.—I never had an opportunity to present my views to these gentlemen.

The CHAIRMAN.—You had an opportunity—

Mr. SULLIVAN.—(Interposing) I just arrived

here, and I would like to show what I have got. I just arrived here at 10 o'clock, after a five days' trip from San Francisco, and it is my pleasure to show you gentlemen this proposition in all its details.

The CHAIRMAN.—We are not in the real estate business.

Mr. SULLIVAN.—I know, and that is not the spirit, gentlemen at all, but to show that there are available supplies. I do not care about San Francisco buying this; I only want to show this committee—

The CHAIRMAN.—(Interposing.) I want to ask you if you do not think, as a citizen, as a man, and as the president of a rival contending supply, that you are taking a good deal of responsibility on yourself to set up your judgment and your views—interested, as they must be, from your ownership in that property—as against the views of 11 Members of Congress, the Secretary of the Interior, the Secretary of Agriculture, the head of the Reclamation Service, the head of the Geological Survey, the head of the Forestry Service, [125] the army board, and Gifford Pinchot, the national conservationist?

Mr. SULLIVAN.—I feel this, gentlemen, that if those gentlemen which you name knew this property as I know it, know the truth about it, they would all be in favor of the Blue Lakes proposition.

The CHAIRMAN.—But you admit that you are an interested party, do you not?

Mr. SULLIVAN.—Unfortunately I am.

The CHAIRMAN.—And you do not contend that any of the gentlemen I have named are pecuniarly

interested parties?

Mr. SULLIVAN.—Not at all; absolutely no, sir.

The CHAIRMAN.—Then what would you say this committee should do, in the face of one man appearing here who has an ownership in the proposition, who is the president of a rival concern, as against this array of witnesses who come here without any pecuniary interest whatever?

Mr. SULLIVAN.—I would say this, gentlemen, that you give my engineers a chance to appear before your committee and ask for the production of the Bartell report from the city engineer's office.

The CHAIRMAN.—Well, just let me interrupt you right there; I do not want to be harsh at all, but when you wired us on the 22d— and I hold your telegram in my hand—you had seen a photographic copy of the Bartell report; then you received a telegram from us notifying you to come here on the 7th of July, when we would hear you fully, and I can not fathom why you did not bring that report here to-day and exhibit it to the committee.

Mr. SULLIVAN.—As I have stated, Mr. Ferris, I was tied up for two weeks on a jury, under the strict orders of the Superior Court of my city, and I could not even go to my family; I was under the custody of the sheriff in the police-graft cases in San Francisco.

The CHAIRMAN.—It would not have required much time to get the photographic copy of the report and bring it here.

Mr. SULLIVAN.—Mr. Aston was to come on with

me, but unfortunately he was sick the day I left there, but he would like to present his complete report to you and answer any engineering questions that would come up from able engineers; that report would be ready in a few weeks. It is for that reason that Mr. Aston is not here, because he was taken sick. However, I feel that I can telegraph and get the suppressed report." [126]

Thereupon the following question was asked of the witness Eugene J. Sullivan:

"Q. In your appearance before the Public Lands Committee, did you report to them that it would take the entire Mokelumne supply—that the so-called Bartell suppressed report took in the entire Mokelumne catchment as a source of supply to the City of San Francisco and not your property singly?"

Counsel for the defendants objected to said question on the ground that it was immaterial, irrelevant and incompetent. The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 2.

To said question the witness answered: "I did."

Thereupon, the following questions were asked and the following proceedings occurred in the examination of said witness Eugene J. Sullivan with reference to the properties of said Sierra Blue Lakes Water and Power Company of which he was president:

"Mr. BLAKE.—Q. Mr. Sullivan, how much, as near as you can recollect, have you expended on the

company's water properties, in construstion and in other works and matters, in order to maintain your company's and the bondholders, water rights and other rights since you became president of the company in 1910?

Mr. BARRETT.—Objected to on the ground that it is immaterial, irrelevant and incompetent."

The Court overruled said objection and counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 3.

To said question the witness answered: "About $100,000." [127]

"Mr. BLAKE.—Q. Was it necessary to obtain such moneys from time to time in order that the company's water rights and properties be maintained for the benefit of the bondholders and stockholders of the Sierra Blue Lakes Water and Power Company, of which you were the president?

Mr. BARRETT.—That is objected to on the ground that it is immaterial, irrelevant and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 4.

To said question the witness answered: "It was."

"Mr. BLAKE.—Q. Did you consider them to be of such value that you would feel justified in paying heavy interest or making heavy sacrifices in order that you should obtain money necessary to obtain such rights and properties for your company and on

behalf of your bondholders?

Mr. BARRETT.—That is objected to on the ground that it is immaterial, irrelevant and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 5.

To said question the witness answered: "Yes, sir."

"Mr. BLAKE.—Q. I will ask you, Mr. Sullivan, whether or not during the time since you became president of the company, you have had outstanding any options for the purchase, whether you have given any options for the purchase of your properties, upon which a considerable consideration was paid down? [128]

Mr. BARRETT.—That is objected to on the ground that it is immaterial, irrelevant and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 6.

To said question the witness answered: "Yes, sir."

The witness further testified that in the month of May, 1913, he executed a power of attorney to Richard Keatinge and Richard H. Keatinge, his son, giving them power to sell the properties of the Sierra Blue Lakes Water & Power Company, and that the witness' commission agreement with plaintiff ceased upon the execution of said power of attorney.

Upon cross-examination the witness testified that

his going to Washington was for the purpose of laying before the Committee of Public Lands of the House of Representatives the facts with respect to the properties of the Sierra Blue Lakes Water & Power Company and to vindicate aspersions that had been put upon that company. There was here read in evidence an extract from the proceedings of the Public Lands Committee of the House of Representatives showing that at said time the witness testified as follows:

[Extracts from Proceedings of Public Lands Committee.

"Mr. RAKER.—Going right back again, it must be a fact, from your position and from your whole attitude before the committee now, that you want to demonstrate to the committee and Congress that there is another water supply there that is adequate and cheap, and you want to sell it to the City and County of San Francisco, is not that right?

Mr. SULLIVAN.—That is my position; yes, sir."

The cross-examination of the witness then proceeded as follows: [129]

"Mr. BARRETT.—Now, will you reconcile with what I have just read to you your statement on direct examination this morning that you went to Washington to vindicate the position that you had taken with respect to your plant, and so forth? Will you reconcile it with this statement to the committee that you went there and you agitated against Hetch Hetchy to sell your plant to San Francisco?

The WITNESS.—Mr. Barrett, I would like to explain my position in Washington. I arrived in

Washington at half past nine o'clock. I telephoned—

Mr. BARRETT.—(Intg.) Pardon me, Mr. Sullivan. As you are going into an explanation, I will address your attention to just a little more on the same line, and you can probably answer it all. At page 343 I will read this, which I will incorporate into my previous question:

'Mr. RAKER.—Now, one of the principal reasons of your objection here is that you have a water supply that you believe is available?

Mr. SULLIVAN.—Yes, sir.

Mr. RAKER.—Your purpose is to present to the committee the idea that your supply ought to be bought by the City and County of San Francisco?

Mr. SULLIVAN.—Well, we say that it is an ample supply.

Mr. RAKER.—But answer the question. I want to get it directly before the committee. Your purpose is to convey to the committee the idea that you have a good and sufficient water supply?

Mr. SULLIVAN.—Yes, sir.

Mr. RAKER.—And that it is the duty of San Francisco to buy your supply of water, reservoir site, etc.?

Mr. SULLIVAN.—Yes, sir, I believe that is a fact, with a saving of millions of dollars to the city.'

Now, I will ask you, do those extracts, which you testified to before the committee at Washington, represent truthfully your purpose in going there represented by your testimony this morning.

The WITNESS.—My purpose is represented by

my testimony this morning. I want to say this in extenuation of my appearance before the House Committee; I arrived at Washington at half past nine o'clock; I telephoned to the Hon. Scott Ferris my arrival in Washington, and asked for a few minutes to consult my attorney and get my breakfast, et cetera. He said that the committee went on promptly at ten o'clock. I appeared before the committee and made my little talk, and then was subjected to a very [130] severe examination, without the assistance of counsel, without any one to object to a question, everything went, and I was—to use a word—rattled toward the end, and I made statements there that, on reflection, I would not have made.

Mr. BARRETT.—Do these that I have just read to you constitute statements that you made there which upon reflection you would not have made?

The WITNESS.—Yes, sir.

Mr. BARRETT.—Then it is not true, as you told the committee, that you were there because you had an opposition water supply, and you thought San Francisco ought to buy it: That is not true?

The WITNESS.—That was not my purpose in going to Washington."

During the trial a further statement of the witness, Sullivan, made before the Committee of Public Lands of the House of Representatives, was read to the jury as follows:

"Mr. SULLIVAN.—Mr. Chairman and gentlemen of the committee, I thank you with a fullness of heart for the high privilege of appearing before you

to-day, and yet it is only characteristic of your spirit for fair play that has ever been the stamp of American statesmen. Little did I think until quite recently that the consideration of H. R. 112 and 4319 would occupy your valuable time at this session of Congress, believing that you were convened to consider those vital questions that stand pre-eminently before this country to-day—the currency and the tariff. We had hoped, and still hope, that your honorable committee would defer any action until you heard all the evidence; but, be that as it may, I am here to assist and do all in my humble way to the end that when your honorable committee does act it will do so advisedly and with a complete knowledge of all the facts; and whatever your decision is, I, for one, feel that it will be the expression of the representatives—free and untrammeled—of the greatest country on the globe. My whole nature, gentlemen, revolted and I trembled with rage when I read a few days ago in the daily press of my own city that my telegram to your honorable committee was construed to cast a reflection upon the advisory board of Army engineers. Such, indeed, is far from the truth.

My father was a Union soldier and my four brothers all answered the call of their country in the War with Spain. One was with Dewey on the U. S. S. "Olympia" at the battle of Manila Bay, and the [131] injuries there received on that eventful day —May 1, 1898, have left him a physical wreck to this hour. Another dear brother—noble-hearted boy that he was—gave up his young life following the flag; murdered by being chopped to death by Filipino

bolos while held a prisoner of war amid the jungles of Luzon. As for myself, at 16 years of age I had the honor to serve with the United States Army in the Department of Arizona and New Mexico. From Fort Wingate to El Paso and from Huachucas to Fort Mohave, time and again I have ridden the road. Engraven on my memory that time cannot erase are the recollections of the days of my early manhood in the great Southwest associated with the officers of the line. It was there I formed my high esteem for the personnel of the army. Anl my long trip from the city by the Golden Gate to the National Capital, if for no other purpose, has amply repaid me, yes, a hundredfold, in giving me an opportunity to say a brief word before this honorable committee of the House of Representatives in expression of the regard and admiration, yes veneration, in which I hold the officers of the United States army."

During the cross-examination of the witness Eugene J. Sullivan, it transpired that the witness had made an offer to the City and County of San Francisco to sell to the City and County of San Francisco the water rights of the Sierra Blue Lakes Water and Power Company on the Mokelumne River as a source of water supply for San Francisco. Thereupon, the following question was asked and the following proceedings occurred during the redirect examination of the witness by counsel for the plaintiff:

"Mr. BLAKE.—Q. Mr. Sullivan, state to the jury whether in your first contact with the city in offering the Sierra Blue Lakes Water and Power Company's properties for a water supply, you went to

them in the interest of the company, or the city came to you in the interest of the city?

Mr. BARRETT.—We object to the question upon the ground it is immaterial, irrelevant and incompetent and not redirect examination."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 7. [132]

To said question the witness answered:

"The City Engineer in October, 1910, sent a communication to the company and in that communication he asked at what price this property could be obtained by the city." [133]

The witness then identified a letter, dated October 14, 1910, from Marsden Manson to A. F. Martel, as the communication referred to in his letter, and a letter from the witness to Marsden Manson, dated October 29, 1910, as the reply to said letter. Thereupon the following occurred:

"Mr. BLAKE.—We offer these letters in evidence.

Mr. BARRETT.—We object to them as immaterial, irrelevant and and not redirect examination."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designated as their

Exception No. 8.

Said letter from Marsden Manson to A. F. Martel was thereupon admitted in evidence and marked "Plaintiff's Exhibit 14," and is as follows:

[Plaintiff's Exhibit No. 14—Letter, Dated October 14, 1910, from Marsden Manson to A. F. Martel.]

"San Francisco, October 14, 1910.

Mr. A. F. Martel,
Box 95, Burlingame,
San Mateo, Co., Calif.

Dear Sir:—

I will be pleased to have from you a statement as to the price for which you will sell to the City, the rights held by your Company on Mokelumne, together with a statement as to the exact nature and extent of these rights and segregation of those obtained by purchase and those obtained by grant, guaranteeing the title in each and every case both to properties and to rights. In addition to this data, I will be pleased to have copies of such maps and engineering reports as you may have which will show the rainfall and run-off, mode of development and cost of work necessary for the full development of the supply and a statement of the capacities of each reservoir, canal and conduit necessary for such development. Give also in this, the maximum development of the works in such units as will enable this office to determine whether it will reach a maximum of 200,000,000 gallons of water per day in its most critical periods.

Respectfully yours,
MARSDEN MANSON,
City Engineer."

MM–MLS. **[134]**

Said letter from Eugene J. Sullivan to Marsden Manson was thereupon admitted in evidence and marked "Plaintiff's Exhibit 15," and is as follows:

[Plaintiff's Exhibit No. 15—Letter, Dated October 29, 1910, from Eugene J. Sullivan to Marsden Manson.]

"October 29, 1910.

Marsden Manson, Esq.,
City Engineer,
Dept. of Public Works,
City.

Dear Sir:—

In response to your letter of the 14th inst., requesting a statement of the nature and extent of the properties and rights, validity of titles, capacity of the Blue Lakes and Sierra Nevada Water and Power Company's holdings on the Mokelumne; together with engineer's reports and maps of same; I am directed to submit to your office the report of Russell Dunn, C. E. and C. M. Burlesan, C. E. on the said properties.

Deeds and abstract of Title can be furnished at any time. In regard to the price will state that I am unable at the present time to submit the figure that the Company wolud accept, but can assure you that this matter can be arranged satisfactorily should our properties be considered.

I beg to remain,
Very sincerely yours,
EUGENE J. SULLIVAN."

Thereupon, the following occurred:

"Mr. BLAKE.—Q. I will ask you whether you were present at a meeting of the San Francisco Civic Center, at St. Francis Hotel, on November 5th, at which the question of the city's application for its

Sierra Nevada water supply at Hetch Hetchy was a topic of discussion. A. November 5th of what year? Q. November 5th, 1913. A. I was. Q. State whether or not Mr. O'Shaughnessy and Mr. Percy Long were present at that meeting. A. They were.

Q. Do you recall whether Mr. Aston made a public statement at that meeting substantially as follows—

Mr. BARRETT.—Just a minute. I will object to that as immaterial, and not redirect.

The COURT.—What is the purpose of this?

Mr. BLAKE.—This is for the purpose of fixing definitely upon the officials of the City of San Francisco knowledge of the fact of this suppressed report, and upon the defendant, the Examiner Publishing Company, which was present and reported that meeting.

The COURT.—Well, what of that? What is the materiality of it?

Mr. BLAKE.—The materiality of it is the good faith, the good motives, the justifiable ends of the plaintiff herein in engaging in this activity. That **[135]** is the gist and the sting of the libelous publication, the absence of good motives and justifiable ends in these particular activities.

The COURT.—Your question is not finished. Finish your question.

Mr. BLAKE.—On the 5th, when former—

The COURT.—The way to ask that question is to ask him if Mr. Aston made a statement with reference to this report, and then let him state what it was, in substance. You must not read from some-

thing because that is putting the words in his mouth. He is your witness.

Mr. BLAKE.—Q. Did Mr. Aston at that meeting make a statement with reference to his connection with the investigation of that particular subject; that is, the water supply?

A. He did.

Q. What did he state at that meeting, according to your recollection as to the connection that he had and the personal interest which he had in making the disclosures which he had made concerning the alleged suppressed report?

Mr. BARRETT.—That is objected to upon the ground it is immaterial, irrelevant and incompetent, hearsay, not redirect, not in the hearing or presence of the defendant, and some five months after the telegram which inaugurated the opposition in Washington, and not relating to the events covered by the alleged libel in any way.

The COURT.—It is purely hearsay to state what he said about his connection. You can ask him if he made any statement about this suppressed report and let the witness answer in such a *way to* show whether it was brought out that there was such a circumstance connected with the transaction.

Mr. BLAKE.—Q. Did Mr. Aston make a statement in connection with the fact of the suppressed report? A. He did.

Q. Did he make a statement to the effect—

The COURT.—Ask him what his statement was.

Mr. BLAKE.—Q. What was that statement, Mr. Sullivan?

Mr. BARRETT.—The same objection, your Honor."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the **[136]** defendants hereby designate as their

Exception No. 9.

To said question the witness answered:

"He said to the audience that there was a report made by an assistant city engineer named Max J. Bartell on the Mokelumne River upper catchment in which that report said that the Mokelumne River watershed would supply four hundred and some odd—

The COURT.—No, not about the contents of the report he is not asking you; you are being asked as to what he stated as to any suppression of that report.

A. (Continuing.) He stated that there was a report suppressed from the advisory board of engineers on the water supply.

Q. And that was the Bartell report?

A. Yes, sir."

Thereupon the following occurred

"Mr. BLAKE.—Q. I will ask you to state whether or not Mr. O'Shaughnessy took any notice of the statements made by Mr. Aston and made any reply thereto, any public reply thereto?

Mr. BARRETT.—That is objected to as immaterial, irrelevant and incompetent and hearsay."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which ex-

ception the defendants hereby designate as their

Exception No. 10.

To said question the witness answered: "He did."

"Mr. BLAKE.—Q. So far as you can recall, what was his answer to the statement that there was such a report as Mr. Aston stated to be in existence?

Mr. BARRETT.—The same objection, your Honor."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the [137] defendants hereby designate as their

Exception No. 11.

To said question the witness answered:

"He said that Mr. Max J. Bartell was merely one of one hundred and fifty assistants."

Subsequently a copy of the "San Francisco Examiner" of November 6, 1913, containing what purported to be an account of the proceedings of the meeting of the San Francisco Civic Center, was introduced in evidence upon behalf of the plaintiff over the objection of the defendant, and the action of the Court in receiving the same in evidence is hereinafter assigned as error.

[Testimony of Richard Harte Keatinge, for Plaintiff —Cross-examination.]

RICHARD HARTE KEATINGE, a witness on behalf of the plaintiff, testified upon cross-examination, that on May 16, 1913, Eugene J. Sullivan and Adelaide Sullivan, his wife, had executed to the witness and to Richard Keatinge, his father, and to J. R. Pringle, a document reading as follows:

[Power of Attorney, May 16, 1913, Sullivan et ux. to Keatinge et al.]

"WHEREAS, the undersigned, EUGENE J. SULLIVAN, and ADELAIDE SULLIVAN, his wife, are the owners of all the capital stock of the Sierra Blue Lakes Water and Power Company; and

WHEREAS said stock appears in the name of the undersigned upon the stock book of said Sierra Blue Lakes Water and Power Company, saving and excepting those shares necessary to qualify directors; and

WHEREAS the undersigned and each of them are desirous of having persons hereinafter named, or any one of them, make sale of said stock, or any part thereof, upon such terms and at such price per share as the undersigned persons, or any one of them, deem advisable:

NOW, THEREFORE, the undersigned and each of them do hereby appoint RICHARD KEATINGE, RICHARD HARTE KEATINGE and J. R. PRINGLE, and each and all of them, their true and lawful attorneys-in-fact, giving unto said Richard Keattinge, Richard Harte Keatinge and J. R. Pringle full power and authority to make sale of any and all of the shares of the capital stock of the abovementioned Sierra Blue Lakes Water and Power Company upon such terms and at such price per share as in the judgment of said Richard Keatinge, Richard Harte Keatinge and J. R. Pringle, or any one of them, seems meet and proper, **[138]** and the undersigned and each of them do hereby ratify, confirm and approve any and all acts of said Richard

Keatinge, Richard Harte Keatinge and J. R. Pringle, or any one of them, in connection with any sale of said stock of said Sierra Blue Lakes Water and Power Company.

It is the intention of the undersigned that the above power vested in said Richard Keatinge, Richard Harte Keatinge and J. R. Pringle may be exercised by any one of them and nothing herein contained shall in any manner be deemed to be a requirement on the part of the undersigned that a majority of the last-named persons shall be required to act in the event of any sale of said stock.

Full power and authority is given to said Richard Keatinge, Richard Harte Keatinge and J. R. Pringle, or any one of them, to execute and deliver any and all agreements or obligations in any manner appertaining to any sale of said stock. Provided always that the consideration paid for said stock, or any part thereof, shall be actual coin or other tangible property.

IN WITNESS WHEREOF, we have hereunto set our hands this 16th day of May, 1913.

EUGENE J. SULLIVAN.
ADELAIDE SULLIVAN.

State of California,
City and County of San Francisco.—ss.

On this 16th day of May in the year one thousand nine hundred and Thirteen before me, A. H. MACDONALD, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Eugene J.

(Testimony of Richard Harte Keating.)

Sullivan and Adelaide, his wife, known to me to be the persons described in, whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, State of California, the day and year in this Certificate first above written.

[Seal] A. H. MACDONALD,

Notary Public in and for the City and County of San Francisco, State of California, Monadnock Building.

My Commission expires June the 28th, 1915."

The witness further testified that shortly thereafter, in company with his father and the plaintiff, he had gone to [139] Portland to attend a conference with Mr. W. J. Wilsey; that Mr. Wilsey had at that time employed the plaintiff to make a report upon the properties of the Sierra Blue Lakes Water and Power Company, and that on the understanding of the witness the plaintiff was "Mr. Wilsey's man" in the transaction. The witness further stated that he had made an arrangement with Mr. Wilsey with respect to the sale of the properties of the Sierra Blue Lakes Water and Power Company, which agreement was embodied in a written instrument reading as follows:

[Agreement, Dated May 27, 1913, Approved by Sullivan et ux., Addressed to W. J. Wilsey.]

"May 27, 1913.

W. J. Wilsey, Esq.,
Selling Building,
Portland, Oregon.

Dear Sir:

The undersigned, attorneys in fact for Eugene J. Sullivan and Adelaide Sullivan, his wife, do hereby authorize you to make sale, and the undersigned do hereby obligate delivery, of the entire property and assets of Sierra Blue Lakes Water & Power Company at any time within the period of three months from date hereof for not less than:

(a) One million five hundred thousand dollars cash, plus present debts of Company, less a commission to you of fifteen per cent upon sale price, less amount paid for debts of Company; or

(b) Fifty per cent of all stock of any corporation taking over said property of said Sierra Blue Lakes Water & Power Company. Bonds of such corporation of the aggregate value of One Million Dollars, said bonds to be taken not at their face but at the same price per bond as like bonds shall be purchased at the time of floatation. Five hundred Thousand dollars cash, plus present debts of Sierra Blue Lakes Water & Power Company.

In the event that purchase takes this last mentioned form you are to receive a commission of twenty-five per cent upon value of all money and property paid, less of course the moneys paid to extinguish present debts of company.

(Testimony of Richard Harte Keating.)

For information as to the amount that the present debts of the company will aggregate, you are advised that said debts, outside of a bond issue, do not exceed Fifty Thousand Dollars. Of said bond issue there are outstanding bonds of the value of One Million Dollars or more. The bond holders, however, agreed some time ago to sell for Two Hundred Thousand Dollars. The time of the performance of this last-mentioned agreement by the supposed purchaser has expired, but we are informed that no difficulty will be experienced in taking up all **[140]** the bonds for Two Hundred Thousand Dollars or even less. In the event that you should deem it advisable at the present time to secure a formal and written extension of this right to purchase, it can be readily done. There has been an oral extension by a majority of the bond holders and by an attorney representing others.

It is understood, of course, that at the time of sale the property will be free from obligations or entanglements of every kind.

Enclosed find copies of our authority to obligate the people above mentioned. If you desire, these copies will be certified to by a Notary Public or any other public officer with a seal whom you may select.

Yours truly,

_____.

_____.

_____.

Approved:

ADELAIDE SULLIVAN.

EUGENE J. SULLIVAN."

(Testimony of Richard Harte Keating.)

The witness, Richard Harte Keatinge, further testified that while there was no legal agreement that would have prevented the plaintiff from getting another purchaser, still he understood that it would be a breach of faith on the plaintiff's part to have dealt with anyone else while Mr. Wilsey had this option out; that the option was for their good; also that there was no agreement between the Keatinges and Sullivan, or the Keatinges, Sullivan and Wilsey, whereby they all could have consented to a sale of the properties of the Sierra Blue Lakes Water and Power Company to the City of San Francisco; and that the point that Mr. Wilsey always made in connection with the entire deal was that not only must he be absolutely certain that the Keatings had the right to give him this option, on account of the money that he might make out of the sale, but so that he could keep absolute faith with his people in Europe; that he made that point several times, that if he should fall down on this deal and not be able to deliver to his people in Europe, it would put him in bad with them on other deals. **[141]**

[Testimony of Taggart Aston, on His Own Behalf.]

The plaintiff, called as a witness on his own behalf, testified that he was a consulting engineer, forty-one years of age; that his early education had been obtained at Knock Breda Rectory, Belfast, Ireland, in a private school; that he was a British citizen but had taken out his first papers in the United States; further, that his first technical edu-

(Testimony of Taggart Aston.)

cation was at the Methodist College of Belfast; that he was an undergraduate of the Royal University of Ireland; that he did not complete his graduation course, because from the age of sixteen to twenty years he was a pupil under Mr. John H. Swiney, the foremost hydraulic engineer in Ireland. The witness further testified that the usual method of training engineers in Great Britain was to have them go as pupils to corporation members of the University of Civil Engineers.. He further testified that he had studied privately and had taken an undergraduate course in the Royal University of Ireland; that his principal work had been in the matter of water supplies; that he had been employed upon some twenty water supplies for small and large cities, among them a water supply for the City of Belfast; also the Cape Peninsula water supply in Capetown, South Africa; both of these matters being very large projects; that he had also done considerable irrigation work in South Africa, having been chief engineer for some important works there, and for the enlargement of one of the biggest dams in South Africa, undertaken as a special officer of the Government there. Further, that hydraulic work had been his principal work, and his principal training, although at other times he had been engaged on the Irish board of works as engineer in charge of the construction of railways, and under the Capetown Government in South Africa as district engineer in charge of the railways there; that he had come into the United States in September,

(Testimony of Taggart Aston.)

1907; that the first work [142] he had done here was as assistant engineer of some electric railway surveys between Sausalito and Richardson's Bay and Petaluma and Santa Rosa; that from that on he was in private practice; he has been the chief engineer on surveys and the promotion of a semi-transcontinental railway from Coos Bay, Oregon, to Boise, Idaho; also that he has been chief engineer for a larger harbor and railroad project in Northern California; that his principal work had been regarding hydro-electric projects and railroad projects and large enterprises of that kind for English and European syndicates.

The plaintiff further testified that he was not in the employ of the Sierra Blue Lakes Water and Power Company or of Eugene J. Sullivan, but in the employ of one William J. Wilsey to whom the Sierra Blue Lakes Water and Power Company had given an option for the purchase of its properties. There was thereupon read in evidence the deposition of said William J. Wilsey theretofore taken by the plaintiff, in the course of which the following questions were asked by counsel for the plaintiff, and the folowing proceedings occurred:

"Q. 2. State whether or not in or about May, 1913, you employed the plaintiff, Taggart Aston, to make an engineering report upon a hydro-electric and irrigation project in California.

Mr. BARRETT:—I object to the question as immaterial, irrelevant and hearsay."

The Court overruled said objection. Counsel for

(Testimony of Taggart Aston.)

the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 12.

To said question the witness answered: "I did."

"Q. 3. If you answer the last interrogatory in the affirmative, state in connection with what particular project or property you employed Mr. Aston to make such report. [143]

Mr. BARRETT.—The same objection.

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate ts their

Exception No. 13.

To said question the witness answered:

"Known in California as the Sierra Blue Lakes Water and Power Company."

"Q. 4. If you state that the project upon which said report was to be made was that connected with the Sierra Blue Lakes Water and Power Company's properties on the Mokelumne River in California, state whether or not these properties are also known as 'The Sullivan Properties,' and whether or not they are the property of a company of which Mr. Eugene J. Sulilvan was at that time the president.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 14.

To said question the witness answered:

"Yes, they are the same properties."

(Testimony of Taggart Aston.)

"Q. 5. State whether or not the report made by Mr. Aston pursuant to his employment by you, was in writing; also whether or not he made more than one such report *to in* connection with these properties.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designated as their

Exception No. 15.

To said question the witness answered:

"Yes, he made a supplemental report later which I asked him to make." [144]

"Q. 7. State whether said report or reports were obtained by you, or were ever used by you, for the purpose of selling the so-called Sullivan properties on the Mokelumne River in California, to the City of San Francisco.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 16.

To said question the witness answered:

"No, I never offered anything to the City of San Francisco."

"Q. 8. State whether or not said report or reports were obtained by you for use exclusively in offering said properties for sale in Europe.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for

the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 17.

To said question the witness answered:

"They were."

"Q. 9. If your answer to the last interrogatory is in the affirmative, state whether or not you offered said properties for sale in Europe.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the [145] defendants hereby designate as their

Exception No. 18.

To said question the witness answered:

"I did, I offered the properties for sale in Europe."

"Q. 10. If you answer the foregoing interrogatory in the affirmative, state whether or not Mr. Aston had an interest, contingent or otherwise, in any sale that you might make of said properties in Europe.

Mr. BARRETT.—The same objection."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 19.

To said question the witness answered:

"No understanding whatever with Mr. Aston as to any commission, but I certainly intended to give him fair commission out of any work I done, but there is no written proposition of any kind. In fact,

(Testimony of Taggart Aston.)

he never asked any questions."

"Q. 11. If you answer the foregoing interrogatory in the affirmative, state whether or not you informed Mr. Aston who the parties were in Europe with whom you were negotiating the sale of said properties.

A. I informed him of the names of the different people with whom I was negotiating.

Q. 12. If you answer the last interrogatory in the affirmative, state whether or not you notified Mr. Aston as to any particular use or purpose for which said properties were desired by said parties in Europe, if in fact any particular use or purpose was specified.

Mr. BARRETT.—We make the same objection as to that."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the **[146]** defendants hereby designate as their

Exception No. 20.

To said question the witness answered:

"Yes, I told him what we were figuring on using the properties for, and the purposes were hydro-electric and irrigation."

"Q. 17. Have you in your possession any writing purporting to be an original offer addressed to Mr. Aston by Eugene J. Sullivan, as President of the Sierra Blue Lakes Water and Power Company, to sell the properties hereinbefore referred to, which said offer is dated March 10th, 1913? If so, please

(Testimony of Taggart Aston.)

attach the same to your answers hereto, marked as one of the plaintiff's exhibits.

Mr. BARRETT.—I object to that as immaterial, irrelevant and incompetent and hearsay."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 21.

To said question the witness answered:

"Yes, I have an offer, but as to the date mentioned I am not prepared to say until I see the original paper."

"Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world, meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this country and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer.

Mr. BARRETT.—That is objected to as immaterial, irrelevant and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the [147] defendants hereby designate as their

Exception No. 22.

To said question the witness answered:

"Yes, I do."

"Q. 20. State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No.

(Testimony of Taggart Aston.)

18, in any or all of the quarters aforesaid.

Mr. BARRETT.—That is objected to as immaterial, irrelevant and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 23.

To said question the witness answered:

"From all the information that I have been able to secure regarding Mr. Aston, both in America and in Europe, his reputation has been first class."

[Testimony of Richard Harte Keatinge, for Plaintiff.]

Thereupon, the plaintiff called as a witness RICHARD HARTE KEATINGE, who testified that he was a member of the firm of Keatinge and Sons in the spring and summer of 1913, and that at that time he and his father had an option upon the properties of the Sierra Blue Lakes Water and Power Company on the Mokelumne River. Thereupon, the following questions were asked of the witness by counsel for the plaintiff and the following proceedings occurred:

"Mr. BLAKE.—Q. State whether or not you ever employed Mr. Aston to make any engineering report upon those properties. A. I am in doubt on that point.

Q. Well, make a fair statement of the nature of your relations with Mr. Aston at that time, from which the jury can draw its conclusion with reference to these properties and to any report [148]

(Testimony of Richard Harte Keating.)

which you know he made upon those properties at that time.

Mr. BARRETT.—I object to that as immaterial, irrelevant and incompetent and calling for hearsay."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 24.

To said question the witness answered:

"Mr. Wilsey employed Mr. Aston to make this report—Mr. W. J. Wilsey of Portland. We paid half the expense of making the investigation, but I do not believe that Mr. Aston was ever in our employ. I don't know whether legally he was ever in our employ. We paid half the expense and Mr. Wilsey paid the other half of the expense, but he was Mr. Wilsey's man I should say."

[Testimony of Clement H. Miller, for Plaintiff.]

Thereupon, the plaintiff called as a witness CLEMENT H. MILLER, who testified that he was present at the Civic Center Meeting of November 5, 1913, at the St. Francis Hotel. Thereupon, the following question was asked of the witness by counsel for the plaintiff:

"Mr. BLAKE.—Q. I will ask you to state whether or not you have any recollection of Mr. Aston making a statement of what his connection was with reference to having disclosed certain facts and conditions surrounding the suppression of the so-called Bartell-Manson engineering report of the City, at

(Testimony of Clement H. Miller.)
that meeting at that time and place."

Counsel for the defendants objected to said question on the ground that it was immaterial, irrelevant and incompetent and calling for hearsay. The Court overruled said objection and counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 25. [149]

To said question the witness answered:

"Mr. Aston read quite a lengthy statement from manuscript and I have a general recollection of the main points that were covered in that statement.

The COURT.—He simply asked you whether it related to the suppressed Bartell report.

A. It did; yes, sir, it was particularly relating to that suppressed report."

[Deposition of George A. McCarthy.]

Counsel for the plaintiff thereupon read in evidence the deposition of GEORGE A. McCARTHY theretofore taken in Toronto, Canada, on the 5th day of January, 1915, during which the following questions were asked by counsel for the plaintiff and the following proceedings occurred:

The witness having testified that certain documents, consisting of a report made by Mr. Bartell, Assistant City Engineer of San Francisco, addressed to his superior officer Mr. Marsden Manson, and a number of plans, maps and documents all relating to the capacity of the Mokelumne River drainage as a source of water supply, had been obtained by Mr. Aston from the office of the City Engineer

(Deposition of George A. McCarthy.)

of San Francisco, and that a man representing himself to be an employee or an official of the office of the City Engineer, had come to the office of Mr. Aston in the Foxcroft Building, San Francisco, about midday, and demanded the immediate return of said documents, and further, that the report had thereafter become known as the suppressed "Bartell-Manson report," the following question was asked of the witness by counsel for the plaintiff:

"Q. 11. Do you recall whether or not you went to the office of the City Engineer in the **[150]** City Hall in San Francisco some time later, and toward the end of June, 1913, for the purpose of inspecting the original of said Bartell-Manson report? A. Yes.

Q. 12. If you answer the foregoing interrogatory in the affirmative, state whom you saw in connection with the object of your errand, and what was said and done between you upon that occasion in connection with said suppressed report.

Mr. BARRETT.—Objected to as immaterial, irrelevant and incompetent, calling for hearsay and *res inter alios acta.*"

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 26.

To said question the witness answered:

"I saw Mr. Bartell and made known the object of my visit which was to obtain use of, if possible, the report and documents which had been returned to

(Deposition of George A. McCarthy.)

his office, or if they could not be removed from the office, to make certain extracts from them. Mr. Bartell produced a copy of the report and examined it in my presence, but would not allow me to again have possession of it or to make any extracts from it.

Q. 16. State whether or not you ever had any conversation with M. J. Bartell, the author of that report, concerning the same. A. Yes."

"Q. 17. If you answer the foregoing interrogatory in the affirmative, state who were present at such conversation or conversations, where they were held; and what was said or done there, with reference to said report. Did you see the original of said report then and there in the possession of Mr. Bartell?

Mr. BARRETT.—We object to that question in part, namely to that part which says 'what was said or done there with reference to said report,' upon the ground that that much of the question is immaterial, irrelevant and incompetent, calling for hearsay and *res inter alios acta.*"

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the [151] defendants hereby designate as their

Exception No. 27.

To said question the witness answered:

"The only conversation I had with Mr. Bartell regarding the report was on the occasion of my visit to his office in June, when I again endeavored to

(Deposition of George A. McCarthy.)

obtain the document for purposes of reference. No person was present except Mr. Bartell and he refused to allow the document to again go out of his office or to allow any extracts to be made from it. Mr. Bartell produced the copy of the report, but to the best of my knowledge, it was not the copy we had in the office of Mr. Taggart Aston. The original contained many marginal notes in pencil, which the copy produced by Mr. Bartell did not contain, to the best of my knowledge.

The COURT.—You see, Mr. Barrett, he does not answer the part that you object to.

Mr. BARRETT.—No, your Honor."

"Q. 23. State whether or not said Bartell-Manson report, together with the maps, plats, diagrams and plans therein referred to thereto attached, showed upon its face that it was prepared by a competent, skillful and conscientious member of the engineering profession.

Mr. BARRETT.—Objected to as immaterial, irrelevant and incompetent, calling for the opinion and conclusion of the witness, calling for expert testimony on a matter not proper and the document itself is the best evidence.

The COURT.—This witness is a civil engineer, is he?

Mr. BARRETT.—Yes, your Honor."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 28.

(Testimony of Taggart Aston.)

To said question the witness answered:

"The report with the plats and diagrams showed that it had been very carefully prepared." **[152]**

"Q. 24. State whether or not, if you know, the information and data shown thereby was sufficiently full, complete, and in sufficient detail, to comply, from an engineering standpoint, with the requirement placed upon the City of San Francisco, by the Secretary of the Interior of the United States of America, that it, the said City, should proceed, at its own cost, and expense and with due diligence, to secure data upon which to make the determination mentioned in interrogatory No. 20.

Mr. BARRETT.—I object to the question upon the ground that it is immaterial, irrelevant and incompetent, calling for the opinion and conclusion of the witness and calling for expert testimony, and also being the witness' construction upon the requirements placed upon the City and County of San Francisco by the Secretary of the Interior."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 29.

To said question the witness answered: "I believe it was."

[Testimony of J. S. Dunnigan, for Plaintiff.]

J. S. DUNNIGAN, called as a witness on behalf of the plaintiff, testified that he was clerk of the Board of Supervisors of the City and County of San Francisco and that he was present in Washing-

(Testimony of J. S. Dunnigan.)

ton on December 2d, 1913, and was at that time representing the City and County of San Francisco in procuring the passage of the Hetch Hetchy Bill; further, that because he had been for many years an "Examiner" employee he had helped in the preparation of the Washington edition of the "San Francisco Examiner," The witness further testified that he knew John Temple Graves; that Mr. Graves was in Washington at the time of the publication of the said Washington edition [153] of the "San Francisco Examiner," and that he was working in the Hearst office in Washington at the time the paper was published.

[Testimony Stanley Behneman, for Plaintiff.]

Thereupon the plaintiff called as a witness, Stanley Behneman, who after testifying that he was a civil engineer in the employ of the Northwestern Pacific Railroad Company in Sausalito, and was in the employ of Mr Taggart Aston in June, 1913, as an assistant to Mr. McCarthy and Mr. Aston; further, that he was in the office on a day in June, 1913, when an officer, or an employe, of the City of San Francisco, came into the office, made a demand for the return of certain reports, data and documents claimed to be the property of the City of San Francisco, the following question was asked of the witness by counsel for the plaintiff:

"Mr. BLAKE.—Q. Will you state, in your own way, the facts and circumstances in connection with that episode?"

Counsel for the defendants objected to said ques-

(Testimony of Stanley Behneman.)
tion as irrelevant, immaterial and incompetent, as hearsay, as *res inter alios acta,* and without sufficient foundation. The Court overruled said objection and counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 30.

To said question the witness answered:

"It was shortly before one o'clock. This gentleman I didn't know at the time when he entered the door. He made certain demands.

THE COURT.—Q. Who did he say he was? A. He said he was from the Engineering Department of the City of San Francisco, and he wished to have certain records and plans which Mr. Aston had taken. I don't know under what conditions [154] they were taken. He wanted them right away or he would have a warrant issued for them. He appeared to be very excited. He wanted to know when Mr. Aston would return. I told him I didn't know. He said he would wait a while. He did wait quite a while and then he decided to go and he said that these documents must be back by one o'clock." He wanted to know when Mr. Aston would return. I told him I didn't know. He said he would wait awhile. He did wait quite awhile and then he decided to go and he said that these documents must be back by one a'clock."

The witness here identified a certain document as being in his handwriting, and stated that it was

(Testimony of Stanley Behneman.)

an exact copy of certain calculations attached to a plan of the North Fork Reservoir obtained in the office of the City Engineer made by the witness when the document was in his possession. The document was thereupon marked "Plaintiff's Exhibit 27" for identification.

[Further Evidence Introduced for Plaintiff, and Further Testimony of Plaintiff.]

Evidence was also introduced on behalf of the plaintiff in support of the allegation contained in his complaint that a report of the City Engineer of San Francisco had been suppressed from said Board of Army Engineers. In support of said allegation the plaintiff testified that said report was known as the Bartell-Manson report and was made by one M. J. Bartell, an assistant city engineer of the City and County of San Francisco, and was submitted by him in typewritten form to Mr. Marsden Manson, the then city engineer of San Francisco, under the title "Mokelumne River as a Water Supply for the City and County of San Francisco. Apr. 24, 1912." Also that said report was received by said Manson and was by him annotated in his own handwriting and that the cover thereof bore the endorsement in the handwriting of said Manson —"Ready for typing except refer now to Bartell. (signed) M. M."

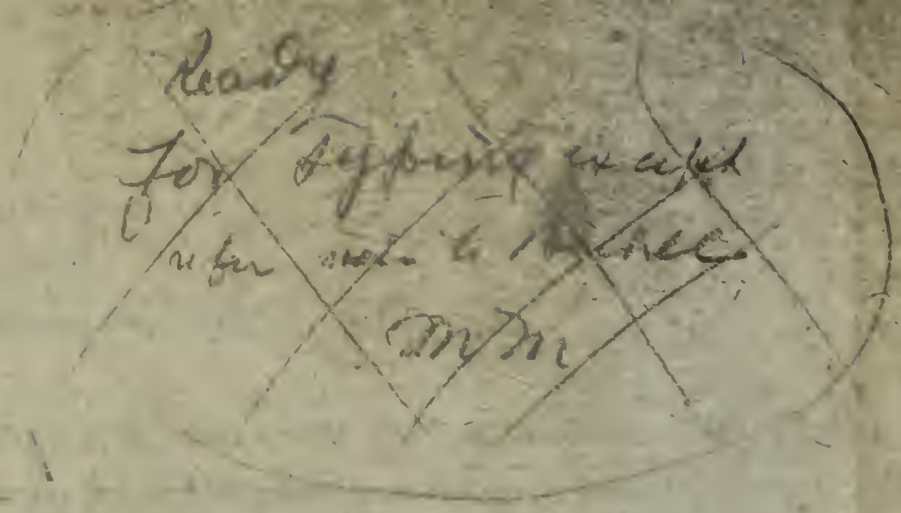
Plaintiff further testified that on the page entitled "Critical Period 1907–08," there was a concluding paragraph in the following words: "The critical period August, [155] 1907, to December, 1909, in-

clusive, equals 518 days. 224,408 divided by 518 equals 432 million gallons daily draft available to San Francisco," and further testified that there was appended thereto a notation in the handwriting of Marsden Manson in the words "provided all rights and all reservoirs are secured and utilized. This source under this assumption is sufficient to meet the demands of the region about the Bay of San Francisco when re-enforced from a full development of Lake Eleanor, but the cost is manifestly prohibitive," Also, that at the same place in said report there was a further notation in the handwriting to Mr. Manson in the following words: "put in the capitalized value of the Sierra & San Francisco Power Company plus $6,000,000. Blue Lakes plus cost of developing 60 M.G.D. later given."

Said Bartel-Manson Report was here received in evidence and marked "Plaintiff's Exhibit 22" A photographic copy thereof is hereto appended and is as follows:

(Here insert.) [156]

[Plaintiff's Exhibit No. 22—Bartell-Manson Report.]



MOKELUMNE RIVER AS A WATER SUPPLY
FOR THE
CITY AND COUNTY OF SAN FRANCISCO
APR. 24 1912.

Mr. Marsden Manson,

City Engineer,

San Francisco, Calif.

Dear Sir:-

Acting on your verbal instructions to investigate the water resources of the Mokelumne River as a probable source of Water Supply for the City and County of San Francisco, after making due allowance for all prior and vested water rights:-

1st - Possible ultimate development (in million gallons per day) of the drainage area (537 square miles) tributary to a point on the main River, just below Electra (at elevation 655 feet U.S.C.S. Base), after making due allowance for all prior water rights.

2nd - Estimate of the cost of a system of storage, with conduits and pipe lines, etc., necessary to deliver 60 millions of gallons daily to San Francisco. The point of diversion to be just below Electra at elevation 655 feet, U.S.C.S. Base.

As full an investigation as the data at hand will warrant has been made and I present herewith as a result, the following:-

Appendix A: Hydrographic Investigations.

Appendix B: Estimates of Cost for a system of storage, conduits, pipe lines, etc., necessary to deliver 60 millions of gallons daily to San Francisco.

Sheet 1 : Map showing lands held by private owners.

Sheet 2 : Map showing Isohyetes, present water development and so far as known, all possible reservoirs.

Sheet 3 : Mass Diagrams with tables of present and ultimate storage and costs.

Sheet 4 : Regional Map showing route for conduit and pipe line from a point just below Electra to San Francisco.

Sheet 4-A : Profile, Electra to San Francisco.

Sheet 5 : Sheet 2 of Rainfall and Runoff Studies.

Sheet 6 : Sheet 4 of Rainfall and Runoff Studies
High Sierra Runoff Curve

Ben Bartlett

(3)

CONCLUSIONS

1st. The possible ultimate development of the 537 square miles tributary to Electra after making due allowance for all known vested water rights, is 250 million gallons daily.

2nd. The cost of a system of storage, with conduits and pipe lines, etc., necessary to deliver 60 million gallons daily to San Francisco, is $40,978,680.00

Respectfully submitted,

Assistant Engineer.

Appendix A.

WATER RIGHTS:

The Sierra Blue Lakes Water and Power Company claim practically all the water rights on this Drainage Area excepting 48½ million gallons daily to the Amador Canal (San Francisco Gas and Electric Company) and 16 million gallons daily to the Mokelumne Hill and Campo Seco Ditch. What water rights are held adversely to the Sierra Blue Lakes Water and Power Company can not be definitely determined except by the Courts; ~~however~~, the waters now actually being adversely used are:-

a. 8,050 million gallons storage owned by the San Francisco Gas and Electric Company.

b. Over 155 million gallons daily is being ~~diverted by the~~ Standard and Amador Canals ~~owned~~ by the San Francisco Gas and Electric Company.

c. Over 20 million gallons daily is taken by the Canals of the San Francisco Gas and Electric Company from the drainage area for the water supply of Jackson, etc.

d. The Volcano Ditch diverts from the drainage area about 10 million gallons daily.

1st. The question as to whether San Francisco could eventually appropriate to its own use the waters now diverted from and used outside of the drainage is dependent entirely upon the uses made of these diverted waters, the highest use for water being for domestic purposes. From all the diversions now being made, part of the waters are being used for domestic supply, and, as to whether the waters not so used can be acquired by San Francisco, rests with the Courts. Therefore,

To acquire + develop an adequate supply from this source

Drainage Area (as, for instance, the San Francisco Gas and Electric Company) has the right and logically would increase its holdings in the drainage area where possible.

In the future, San Francisco ~~will require~~ all and very probably more water than the yield of this drainage area. Therefore, any joint user or owner would have San Francisco at great disadvantage. As any agreement that could be made with the present owners might and probably would lead to controversy at some future time. ~~Therefore,~~ it will be assumed for the purpose of this investigation that in case San Francisco shall be required to make use of this source, all water rights on the drainage area tributary to Electra (including vested water rights and their appurtenances) must be acquired by that City.

Appendix A-8

PRIOR WATER RIGHTS NOT AVAILABLE FOR DIVERSION AT ELECTRA

1. Woodbridge Canal

Capacity, 62 second feet or 40 million gallons daily.

Actual amount filed upon not known

2. About 20 million gallons daily of the flow of the Amador Canal is diverted to Jackson and vicinity for domestic and industrial uses.

3. About 10 million gallons daily of the flow of Panther and Tiger Creeks is diverted from the drainage area for mining near Volcano.

4. About 16 million gallons daily is diverted by the Mokelumne Hill and Campo Seco Ditch from the South Fork for domestic use at Mokelumne Hill and mining in that vicinity.

5. About 10 million gallons daily is diverted from the South Fork by the Clark Ditch for domestic and mining purposes. A portion of these waters are returned to the South Fork above Electra and would contaminate the remaining waters.

THE PROCEDURE IN DETERMINING THE AMOUNT OF WATER AVAILABLE TO SAN FRANCISCO IS TAKEN AS FOLLOWS:-

1st The proper allowance for the Woodbridge Canal is deducted from the natural flow at Electra.

2nd The amount diverted to Jackson from the Standard and Amador Canals is of course continuous on account of the Storage at Bear River, Blue Lakes, etc. The other rights, with but very little storage, could be made continuous and they will be here so considered. Therefore, after deducting the Woodbridge Canal rights (as above mentioned) the gross yield will be determined and from this, the following deductions must be made:-

20	million gallons daily to Jackson and vicinity
10	" " " " Volcano Ditch
16	" " " " Mokelumne Hill and Campo. Seco Ditch
10	" " " " Clarke Ditch
56	million gallons

The net amount of water, after deducting the Woodbridge Canal rights and the 56 million gallons daily as above noted, will thus be considered the amount available to San Francisco.

Stream Flow Data:

The attached table, gives [illegible] all the stream flow measurements made on [illegible] drainage basins.

MOKELUMNE RIVER

Runoff Inches Depth on Catchment Area

Season	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	Jun.	July.	Aug.	Total	
Lone Star Hills 657 sq. mi. 49" Mean Seasonal Rainfall														
1878-79	#(.20)	#(.21)	(.06)	(.06)	(.5)	1.89	2.40	5.21	5.69	6.16	.95	(.29)	(23.70)	( ) Est.by State Engineer
80	(.04)	(.03)	(.10)	.82	.4	.65	1.13	7.73	8.83	10.27	4.82	.63	(35.53)	
81	(.04)	(.29)	(.17)	.51	1.72	4.03	1.97	5.42	5.32	2.10	.28	(.17)	(22.92)	#( ) Est. by U.S.G.S.
Amador Dam 353 sq. miles 55.5" Mean Seasonal Rainfall														
1899-00	0	.29	1.52	1.30	1.64	.72	2.20	2.36	5.50	2.29	.55	0	18.46	
00-01	.05	.46	.98	1.16	1.41	4.13	2.84	3.15	6.85	5.73	1.07	.35	28.18	
01-02	.13	.29	.68	1.59	.46	1.04	1.46	4.03	6.87	5.39	.78	.15	22.87	
Standard Dam 329 sq. miles 55.5" Mean Seasonal Rainfall														
02-03	.06	.10	.52	1.30	1.13	.98	2.41	4.57	7.77	6.04	1.50	.09	26.47	
03-04	.04	.04	1.34	.71	.63	4.58	6.52	5.88	12.75	8.97	1.57	.20	43.23	
04-05				2.78	2.34	4.58	8.57	10.55	10.90	10.00	8.96	1.30		
05-06	.43	.45	.43	.55	.60	.45								
Electra 537 sq. miles 54.0" Mean Seasonal Rainfall														
1900-01	#(.05)	#(.45)	#(1.00)	#(1.00)	2.14	6.40	4.30	4.24	9.93	7.97	.55	.40	40.93	
01-02	.12	.16	.44											
02-03										5.43	.74	.37		
03-04	.46	.39	1.77	.40	.33	5.00	8.96	7.85	11.62	7.50	1.54	.24	46.06	
04-05	.35	1.78	.39	.68										
Clements 642 sq. miles 49.0" Mean Seasonal Rainfall														
1904-05	.36	(2.50)	.44	.57	.77	1.38	2.54	3.40	4.55	2.89	.34	.23	(20.00)	
05-06	.24	.20	.14	.17	1.79	1.31	4.52	5.10	8.44	10.46	6.35	.64	39.36	
06-07	.35	.34	.43	1.57	2.05	4.51	8.76	7.70	7.57	8.20	5.58	1.27	48.73	
07-08	.45	.50	.41	.59	.98	.66	1.46	3.00	3.41	2.19	.41	.19	14.23	
08-09	.23	.25	.22	.29	5.24	3.67	3.01	4.90	6.67	7.51	1.48	.21	33.68	
09-10	.13	.24	1.66	2.70	2.39	1.52	4.20	5.46	5.54	1.70	.30	.11	25.95	

Appendix A:

CRITICAL PERIODS OF RAINFALL AND RUNOFF

In the following study consideration of a municipal water supply, provisions should be made so that the supply will be reliable under the most severe conditions. To this end, the source of supply must be such that with reasonably economical facilities, it can be safely depended upon to yield the necessary amount of water during the most critical period of runoff.

From the Rainfall and Runoff Studies, Sheet 2, Sheet 5 of this Report, we find the following critical seasons of rainfall:-

Season	Seasonal Rainfall as a Per Cent of Mean Seasonal Rainfall	Seasonal Rainfall of the Drainage Area Tributary to Electra, (Mean Seas. Rainfall 54")
1850-51	40%	21.6"
54-55	75%	40.5"
55-56	62%	33.5"
56-57	64%	34.6"
57-58	65%	35.1"
62-63	57%	30.8"
63-64	48%	25.9"
69-70	70%	37.8"
70-71	68%	36.7"
72-73	72%	38.8"
74-75	63%	34. "
76-77	60%	32.4"
86.87	74%	40. "
87-88	66%	35.6"
88-89	66%	35.6"
95-96	73%	39.4"
97-98	58%	31.3"
1907-08	63%	34.0"

The critical season of 1850-51 is based on very meager data. From 1850-51 to 1862-63 inclusive, there are only two records, Shingle Springs and Sacramento.

In the first 14 seasons (1850 to 1864 inclusive) there were 7 critical seasons, two of which, (1850-51 and 1863-64) if these records be given full credit, are the most severe known. In the last 47 seasons (1864-1911) there are 11 critical seasons, of which the season 1897-98 was the most severe and was immediately succeeded by two seasons of deficient rainfall.

A study of Sheet 5 shows that the Valley Stations (Sacramento, Chico, Marysville, etc.) do not give a fair indication of Sierra conditions. It is therefore, not thought advisable to give much weight to the Sacramento Record of 1850-51.

The record of Nevada City for 1863-64 is of doubtful accuracy.

Nothing is known of the runoff of these earlier critical periods. The earliest runoff records were made in 1878.

For the critical season 1897-98 there is ~~much~~ only sufficient rainfall and runoff data to serve as a guide in determining the probable runoff of the Mokelumne River area.

The manifest requirement of a source of water supply for San Francisco is that it must meet the necessities of that City for at least one hundred years.

During the time the project is being developed to its ultimate capacity, opportunity and time will have determined whether more critical conditions will have to be met than the Season 1897-98, and should it be found that there shall be periods more severe than 1897-98, the storage will have to be increased to meet these conditions.

In view of the foregoing, it is not thought advisable to consider the earlier critical seasons and the period of 1896-1900, on account of the duration, is adopted as the basis for determining the probable safe yields.

Reference to the table ~~(~~above given~~)~~ of observed runoff on the Mokelumne River Drainage Basin shows that no observations were made for the period 1896-1900. The seasonal runoff can be ~~satisfactorily~~ estimated by use of the High Sierra Runoff Curve ~~(Rainfall and Runoff Studies Sheet 41~~, Sheet 6 of this report.

Attention is especially called to the fact that the measured runoff of the Stanislaus River Drainage Area for the Season 1897-98 is less than that indicated by the High Sierra Runoff Curve. The measured runoff is 7.7" depth on the Drainage Area. The High Sierra Runoff Curve indicates 8.8" depth on the Drainage Area.

This extremely low runoff of the Stanislaus River for the Season 1897-98 was fully considered at the time the High Sierra Runoff Curve was developed and it is thought that the Mokelumne River Runoff can safely be taken from the curve.

A careful study was made to obtain a basis for the distribution of total seasonal runoff to the various months of the Season. The Stanislaus and Tuolumne Rivers are the only nearby High Sierra streams upon which measurements were made during the period 1896-1900. The occurrence of the monthly runoff from both these drainage areas was compared with the occurrence of the monthly runoff of the Mokelumne River Drainage Area for the seasons during which the runoff was measured for the Drainage Areas. The occurrence of the monthly runoff from these three Drainage Areas is in reasonably close ~~agreement~~ accord. It was found that there was no materially different result whether the Stanislaus or the Tuolumne Runoff was applied in determining the Mokelumne River runoff. Therefore the monthly means of the rates of runoff of the Stanislaus and Tuolumne Rivers was taken as the basis for distributing the estimated total seasonal runoff of the Mokelumne River during the period 1896-1900.

On the above basis, the annexed tables were calculated, as follows:-

Mean Seasonal Rainfall for the Drainage Area tributary to Electra is 54.0"

For the Season 1897-98, the rainfall was 58% of normal.
58 x 54" = 31.3" Rainfall.

From the High Sierra Runoff Curve Sheet 6, 31.3" Rainfall gives 12" Runoff.

12" on one square mile = 209 million gallons.

During September 1.22% ran off.

.0122 x 209 = 3. million gallons per square mile

From 537 square miles (the area tributary to Electra) the total runoff for September was 537 x 3 = 1611 million gallons, etc.

EVAPORATION FROM STORED WATER AND OTHER LOSSES.

Losses by evaporation and absorption, etc. were approximated at 10,000 million gallons the critical period (August 1897 to February 1899 inclusive). On the basis of the Lake Eleanor Evaporation records (Sheet 3) the evaporation from the 3,279 acres of stored water would be about 5,000 million gallons.

The losses due to leakage, accident, losses in the natural channels from the dams to the point of diversion, etc., are assumed at 5,000 million gallons.

The attached sheet gives the runoff calculated and distributed previously detailed.

As above mentioned the previous water rights and losses to be provided for are:-

1. Woodbridge Canal - 62 second feet of the natural flow of the stream at Clements.

2. Fifty-six millions of gallons daily must be supplied from the natural stream flow and the system of storage to the five canal systems previously mentioned.

3. For the critical period (August 1897 to February 1899 inclusive) 10,000 million gallons must be allowed for evaporation and other losses.

The tables show in detail a possible draft of 306 millions of gallons daily after having provided for the Woodbridge Canal Rights and Evaporation and other losses.

THEN THE WATERS AVAILABLE FOR SAN FRANCISCO ARE 306-56 = 250 MILLIONS OF GALLONS DAILY.

See Mass Diagrams Sheet 3.

					DRAFT 300 M. G. A DAILY						
			Run off in Mil Gals			From Storage	Total	from to	at end of Month	Waste
Oct			2115	910							
Nov			9690	8490							
Dec			9690	8490							
Jan			9690	8490							
Feb			43430	41280	8568	0	8568	32712	32712		
Mar			31800	30360	9488	0	9488	208	53688		
Apr			68	67600	9180	0	9180	270	63468	31348	
May			108300	108060	9488	0	9488	0	85372	95374	
Jun			38200	38000	9180	0	9180	0	80652	28820	
July			12180	12180	9488	0	9488	0	80652	2674	
Total			337	323900							
Aug			2680	1440	1440		9848		72612	0	
Total											
Oct.			2115	910	910		9180	0	55252	0	
Nov											
Dec											
Jan			2980								
Feb			5280								
Mar											
Apr			26700								
May			29760								
Jun			13500								
July			1440								
Aug			0								
Total											
Oct.			0	0	0		9180	0	30116		
Nov			0	0							
Dec											
Jan			4680								
Feb			4780								
Total											
Oct			4660								
Nov											
Dec											
Jan											
Feb											
Mar											
Apr											
May											
Jun											
July											
Aug											
Total											
Oct			4660								
Nov											
Dec											
Jan											
Feb											
Mar											
Apr											
May											
Jun											
July											
Aug											
Total											

Date	Rainfall as a % of	Seasonal Rainfall of area	Runoff	
			High Line of Curve	Gallons per Sq Mile
		313	18	
			311	324
			31	

but the coal is manifestly [illegible]

12

CRITICAL PERIOD 1907-09:

The flow of the Mokelumne River at Clements was observed during the period 1907-08. The probable flow at Electra was calculated as shown on the attached sheet.

The flow as measured at Clements does not include any of the diverted waters and they are, therefore, automatically provided for. In calculating the amounts of water available to San Francisco it is necessary to provide only for the Woodbridge Canal Rights.

It must be borne in mind that the storage of 8,050 million gallons of the San Francisco Gas and Electric Company was used at Electra during this period and it was, therefore, measured in the stream flow at Clements. In the consideration of this period, this storage must be deducted from the total storage 80,058 million gallons leaving 72,608 million gallons as the total available.

From the column giving the amounts available after providing for the Woodbridge Canal Rights, the total amount available to San Francisco is:-

161,800 million gallons Total Flow for Period August 1907 to December 1909 inclusive.

72,608 storage *mil. gals.*
234,408

10,000 for evaporation and other losses.

224,408 *mil. gals.*

The critical period August 1907 to December 1909 inclusive = 518 days. 224,408 ÷ 518 = 433 million gallons daily draft available to San Francisco. *provided all rights and all [illegible] be [illegible] and utilized, this [illegible] under these assumptions is sufficient to*

(put in Capitalized value of Tuna [illegible] … must the demand of the [illegible] around the Bay of [illegible] … [illegible])

Date	Mean (U.S.G.S.)	[illegible] 62 Sec. feet for Wood-[illegible] Rights	[illegible] or flow at Electra [illegible] table	Available to San Francisco	Col 5 [illegible] to Mil. Gals. for Month
[illegible]-07					
Sep.	202	140	192	140	2710
Oct.	190	128	180	128	2560
Nov.	248	186	236	186	3600
Dec.	876	814	823	[illegible]14	16280
Jan.	1140	1078	1080	1078	21560
Feb.	2780	2718	2640	2640	47500
Mar.	4880	4818	4630	4630	92600
Apr.	4430	4368	4200	4200	81400
May	4220	4158	4000	4000	80000
June	4720	4658	4480	4480	87000
July	[illegible]0	[illegible]8	3160	3160	[illegible]
Total	27[illegible]06	26334	25621	25456	498410
Aug.	703	641	668	[illegible]1	12820
1907-08 Sep.	257	195	244	195	3780
Oct.	276	214	262	214	4280
Nov.	234	172	222	172	3330
Dec.	328	266	312	266	5320
Jan.	53[illegible]	[illegible]	[illegible]10	475	9500
Feb.	393	331	373	331	6200
Mar.	817	755	776	755	15100
Apr.	1730	1668	1642	1642	31800
May	1900	1838	1806	1805	36100
June	[illegible]	119[illegible]	1200	1200	23200
July	229	167	216	167	3340
Aug.	104	42	99	42	840
1908-09					
Sep.	135	73	12[illegible]	73	1410
Oct.	142	80	1[illegible]5	80	1600
Nov.	124	[illegible]	118	62	1200
Dec.	161	[illegible]	1[illegible]3	[illegible]	1980
[illegible] Crit. [illegible]	9330	8276	8867	8219	161800
Jan.	2910	284[illegible]	2760	2760	55200
Feb.	2260	2198	2150	2150	28800
Mar.	1670	1608	1580	1580	31600
Apr.	2810	2748	2670	2670	51700
May	3710	364[illegible]	3520	3520	70400
June	4310	4248	4100	4100	79500
July	824	862	782	782	15640
Aug.	11[illegible]	[illegible]	10[illegible]	53	1060
Total	1[illegible]3	18213	17671	17615	333900

Critical Period 518 Days

1 Date		2	3 Mean Seas. Rainfall	4 Seas. Rainfall as a % of mean Seas. Rainfall	5 Col. 3 X by Col. 4 Seas. Rainfall	6 Runoff from High Sierra Curve	7 Col. 6 X by Col. 2 Sq. Mi. Inches	8 Total Sq. Mi. Ins. for both Areas	9 Ratio of Yield of 537 Sq. Mi. to 642 Sq. Mi.
1906-07	Mok. Riv. Tributary [illegible] 537 Sq. Mi.		54"	150%	81"	58"	31150	32630	31150/32630 = 95.6%
	[illegible] Electra & C[illegible] [illegible] Sq. Mi.		23"	150%	34.5"	14.1"	1480		
[illegible]		537 Sq. Mi.	[illegible]	[illegible]	31.5"	12"	6[illegible]	6682	6440/6682 = 96.5%
		[illegible] Sq. Mi.	[illegible]	[illegible]	13.3	2.[illegible]	242		

[illegible] area tributary [illegible] of the area [illegible]

capitalized at or three
right- would have to be fully protected

In order to compare the cost of this source with the Tuolumne sources upon the same basis an estimate is made of the cost of developing and delivering 60 mg d to San Francisco from this source. The figures used as and types of construction are the same

INITIAL DEVELOPMENT ~~FOR~~ 60 MILLION GALLONS DAILY TO SAN FRANCISCO

The ~~original~~ limitations controlling this investigation ~~(previously mentioned)~~ are:-

1st That the waters now diverted from and used outside of the drainage area, in addition to the proper allowance for the Woodbridge Canal, will not be available to San Francisco.

2nd That all water and reservoir rights, (including vested rights and their appurtenances) must be acquired by San Francisco.

It is assumed that San Francisco must acquire all water rights in the drainage area, the initial development would naturally include the rights and appurtenances now owned by the San Francisco Gas and Electric Company, ~~but for the purposes of this investigation it is not considered practicable nor advisable to evaluate these properties, and therefore, their purchase will not be assumed in the initial development.~~

The initial development should give at least enough power to pump over Altamont Pass and, if possible, enough for the City distributing system.

The San Francisco Gas and Electric Company through its Amador and Standard Canal Rights controls the low flow of the North Fork, and any North Fork storage would have this limitation when considered for its auxiliary power.

The Railroad Flat Storage (20,000 million gallons) appears from full consideration to be the most logical and it will be adopted for initial development.

Naturally tributary to this Reservoir are 66 square miles of the South and Licking Forks, and 28 miles of the Middle Fork could be made tributary by a 1½ mile canal, and a ½ mile tunnel, making in all 94 square miles.

The runoff of the 94 square miles, calculated as explained above, is shown on the attached sheet.

The prior water rights are the Clark Ditch (10 million gallons daily) from the South Fork and the Mokelumne Hill and Campo Seco Ditch (16 million gallons daily) from the South and Licking Forks.

Then the maximum draft required from this drainage area is 60 + 10 + 16 = 86 million gallons daily.

The most severe period for a draft of 86 million gallons daily would be from July to December 1898 inclusive, a 184 days (see table page).

Then, ignoring the stream flow of August and December the total draft would be 184 x 86 = 15,800 million gallons.

20,000 million gallons storage of Railroad Flat, less

15,800 million gallons draft

leaving 5,100 million gallons or more than enough for evaporation and other losses.

Mokelumne River Drainage Area Tributary to Rail Road Flat Reservoir. Period 1896 1900

Seasons		Monthly Run off as a % of Seasonal Run off	Runoff per Sq Mi in Mil. Gals.	Runoff Tributary to Rail Road Flat Res. 94 Sq Mi
1896-97	Sep	123	8	752
	Oct	68	4	376
	Nov	288	18	1690
	Dec	288	18	1690
	Jan	289	18	1690
	Feb	1242	79	7430
	Mar	932	59	5550
	Apr	2020	128	12020
	May	3127	198	18600
	June	1138	73	6960
	July	402	25	2350
	Total	100%	628	59008
	Aug	74	5	470
1897-98	Sep	122	3	282
	Oct	197	4	376
	Nov	446	9	846
	Dec	692	14	1315
	Jan	319	7	658
	Feb	559	12	1130
	Mar	841	18	1690
	Apr	2521	52	4890
	May	2703	56	5260
	June	1297	27	2540
	July	518	5	470
	Aug	85	2	188
1898-99	Sep	29	1	94
	Oct	45	2	188
	Nov	42	2	188
	Dec	120	4	376
	Jan	292	11	1035
	Feb	284	11	1035
Total for Crit. Period 184 Days		100%	245	23031
	Mar	1768	66	6200
	Apr	2464	92	8650
	May	2035	76	7140
	June	2378	89	8360
	July	437	16	1504
	Aug	1.06	4	376
1899-00	Sep	38	2	188
	Oct	2.01	11	1035
	Nov	8.14	44	4140
	Dec	996	54	5080
	Jan	1084	58	5450
	Feb	395	21	1970
	Mar	1039	57	5360
	Apr	1013	55	5170
	May	2456	133	12500
	June	1628	88	8270
	July	275	15	1410
	Aug	41	2	188
	Total	100%	[illegible]	12991

Note 66 sq mi are naturally tributary to Rail Road Flat Res. 28 sq mi. of the Middle Fork can be made tributary by canal and tunnel —

M. J. B March 1912

CONCLUSIONS

1st. The possible ultimate development of the 537 square miles tributary to Electra after making due allowance for all known vested water rights, is 250 million gallons daily.

2nd The cost of a system of storage, with conduits and pipe lines, etc., necessary to deliver 60 million gallons daily to San Francisco, is $38,086,000.00.

Respectfully submitted,

Assistant Engineer.

[On this subject [illegible] is made
of all plans and estimates made for
other projects submitted in connection with
these examinations.]

[illegible] and pipe lines, etc., [illegible] San Francisco. The point of diversion to be just below Electra, elevation 695 feet, U. S. [illegible]

[illegible] (20,000 million gallons storage) [illegible] the waters available at Electra to furnish 60 million gallons daily through the critical period 1896-1900.

Naturally tributary to this Reservoir are 89 square miles of the South and Licking Forks, and 26 square miles of the Biddle Fork will be considered made tributary by a 1½ mile canal and a 3/4 mile tunnel making in all 94 square miles.

Proposed structures to deliver 60 millions gallons daily to San Francisco:

From the Railroad Flat reservoir the water will be delivered through a 300 second foot canal ten miles to the forebay at a power house on the south side of the Mokelumne River just above Electra.

The elevation of the forebay will be about 2100 feet and the power house about 700 feet, making 1400 feet of effective head.

The power plant will have an initial capacity of 11,000 K.W.

Just below the Electra Power House the water will be diverted by a dam at an elevation of 695 feet to a canal 25 miles in length. The canal follows the contour of the South side of the river to a point about three miles East of Wallace, elevation 300 feet.

Thence by two 80 inch riveted steel pressure pipes 81 miles to the Altamont Pumping Station, elevation 175 feet.

This pipe line will cross in addition to several dry channels and small sloughs, the Calaveras River, Mormon Slough, French Camp slough, San Joaquin River, Tom Payne Slough and Corral Hollow Creek.

All crossings except the San Joaquin River will be on reinforced concrete trestles.

The San Joaquin River, being navigable, will be crossed by [illegible] 36" submerged pipes.

From the Altamont Pumping Station the route will be common to that proposed for the City's Tuolumne River Supply.

The pipe lines across the San Joaquin Valley will discharge into a receiving reservoir at the Altamont Pumping Station, having a capacity of 30,000,000 gallons. This reservoir will be mainly in excavation and will have a concrete lining. Its water surface will be at an elevation of 175 feet. The water will flow from it through outlet pipes and control valves into a pumping station, the pumps of which will deliver the water into two force mains, each having a diameter of 48 inches. The length of these force mains will be 34,000 feet.

The force mains will deliver into a cut and cover conduit at an elevation of 673½ feet, through which it will flow on a grade of 1.3 feet per 1000 to the entrance of first tunnel, which will be 16,140 feet in length, the elevation of the entrance portal of which will be 655 feet.

The new line will join the Grunsky line at about station 560 of the latter, and follow his line from that point to a point just north of Mission San Jose, at about station 1460 of the Grunsky line.

The pressure portion of this line will consist of two pipes each 50 inches in diameter.

Leaving the tunnel above mentioned, the pipe lines will cross the Livermore Valley, passing about two miles south of Livermore, and the ridge of hills between Valle and Calaveras Creeks will be pierced by a tunnel on the hydraulic grade line. The length of this tunnel will be approximately 13,000 feet.

From the outlet of this tunnel, two pipe lines, each of 50 inches diameter, will convey the water to a tunnel on the hydraulic grade line, piercing the ridge of hills between Calaveras Creek and the Santa Clara Valley. The length ofthis tunnel will be approximately 5,600 feet.

All the tunnels on this line being on the hydraulic grade line, it will not be necessary to carry the pipe lines through them.

The two 50 inch pipes are to be continued from the outlet of the last mentioned tunnel, and the new line leaves the Crunsky line at a point about 6,000 feet from its outlet portal, and runs thence in a generally western direction to a crossing of the bay at Dumbarton Point.

About 16,000 feet of this line before reaching the bay will have to be carried on trestles, owing to the swampy character of the ground. In this distance is included the crossing of a navigable slough, where about 300 feet of the line will have to be submerged.

The crossing of the bay will be made with three lines of 36 inch pipe, having cast iron joints with spherical hubs of the type used in the present crossing pipes of the Spring Valley Water Company. This crossing will be about 6,400 feet in length.

The three 36 inch pipes are to be connected to the two 50 inch pipes at each end.

On the west side of the bay, the line will run in a generally western direction, joining the Crunsky line again at about his station 2860 near Redwood City. About 2000 feet of this section will have to be carried on trestles.

From this junction with the Crunsky line, it is followed to the southern boundary of San Francisco, where it will deliver the water at an elevation of about 310 feet.

ESTIMATED COST OF THE SYSTEM JUST DESCRIBED

1.	Water Rights of the Sierra Blue Lakes Water & Power Co.	$6,000,000.00
2.	Railroad Flat Dam, Height 300 feet	4,560,000.00
3.	Diversion Dam on Middle Fork (Estimated)	30,000.00
4.	1½ miles canal (200 sec. ft. capacity)	118,000.00
5.	¾ miles Tunnel (200 sec. ft. capacity)	118,000.00
6.	Conduit from ... R. Flat Reservoir to Power House opposite Electra, 16 miles, 200 sec.ft. capacity	792,000.00
7.	Fore Bay at Power Plant	40,000.00
8.	Power Plant complete, 11,000 H.P.	440,000.00
9.	Diversion Dam below Electra (Estimated)	300,000.00
10.	Conduit 25 miles, capacity 200 million gallons daily	1,980,000.00
11.	2-50" riveted pipes to Altamont, 51 miles, 94,248,000 lbs.	6,402,700.00
12.	Supports lines from Canal to Altamont, 51 miles	306,000.00
13.	Double circuit transmission line, Electra to Altamont, 121,500# Copper, 550 steel towers	450,000.00
14.	San Joaquin River crossing, 3-36" galv. steel pipes complete	63,000.00
15.	Trestles for crossing Calaveras River, Mormon Slough, French Camp Slough, Ten Payne Slough & Corral Hollow Creek	150,000.00
16.	Receiving Reservoir at Altamont complete	139,000.00
17.	Pumping Stations complete, including auxiliaries & building	525,000.00
18.	34,000 feet of double 48" riveted pipe force main from Pumping Station to conduit 13,408,500 lbs.	804,000.00
19.	Cut and cover conduit from force main to summit tunnel, 18,500 feet capacity, 200 million gallons daily	287,500.00
20.	Three lined tunnels 38,240 ft. capacity, 200 million gallons daily	1,373,000.00
21.	Mains connecting tunnels from Summit to S. F., 295,500 ft. 2-50" riveted pipe complete, weight 117,850,850 lbs.	7,071,050.00
22.	Submerged crossings of slough and Bay, 3-36" galv. steel pipes complete, 6,700 feet, Bridges, trestles, culverts and specials,	622,850.00
23.	Supports line from Summit to City Line	435,000.00
24.	Roads and Rights of Way	1,000,000.00
25.	Telephone System	25,000.00
		$34,148,900.00
26.	Engineering and contingencies, 20%	6,829,780.00
		$40,978,680.00

BOARD OF PUBLIC WORKS

MAP

OF THE

DRAINAGE BASIN OF

MOKELUMNE RIVER

ABOVE

ELECTRA

SHOWING PRIVATE & PUBLIC LANDS THEREIN FROM OFFICIAL RECORDS OF U.S. LAND OFFICE AT SACRAMENTO AND COUNTY SEATS.

Prepared under the direction of Marsden Manson-City Engineer

San Francisco, Cal May-1911

Sheet

Note:-

Rainfall stations are shown thus JAMESTOWN 33" The term "8 seas" means that during 8 seasons - (Sept to Aug incl - the rainfall season) precipitation was observed and recorded at the station The inches rainfall given is the deduced mean seasonal rainfall for the past 61 seasons -

Most of the rainfall records of stations in the Sierra Nevada Mountains are for periods of less than 30 seasons. - This period is known to be too short to give a reasonably accurate mean seasonal rainfall. These short period observations were therefore modified so as to give the probable mean seasonal rainfall for the past 61 seasons briefly as follows:-

After a thorough study of all the available observed rainfall in that portion of the Sierras between the Feather and Merced River, inclusive, the four rainfall stations Nevada City, Shingle Springs, Mokelumne Hill, and Sonora, were found to be most representative. - At these stations rainfall has been observed (including 1910), as follows:-

Nevada City	47 seasons - Sept to Aug. inclusive	
Shingle Springs	42	" " " " "
Mokelumne	28	" " " " "
Sonora	23	" " " " "

These four stations by comparison with the observed Sacramento Record of 61 seasons and by intercomparison, were extended so as to give the probable total and mean seasonal rainfall for the past 61 seasons. These stations were then used, to modify the shorter records for adjacent stations observations so as to give their probable mean seasonal rainfall for the entire period. -

For more detailed notes on rainfall and Isohyetes see Map, "Isohyetes & Drainage Basins of Sierra Nevada Mountains" etc.

This map traced from a map made of U.S.G.S. topographical sheets.

LEGEND:-

Drainage Basin
Subdivisions
Rainfall Stations (see notes) Villages
Isohyetes, or lines of mean seasonal rainfall
Canals constructed, projected
Roads
Residences

BOARD OF PUBLIC WORKS

MOKELUMNE RIVER DRAINAGE BASIN

SIERRA NEVADA MOUNTAINS. CALIFORNIA

DIAGRAM SHOWING

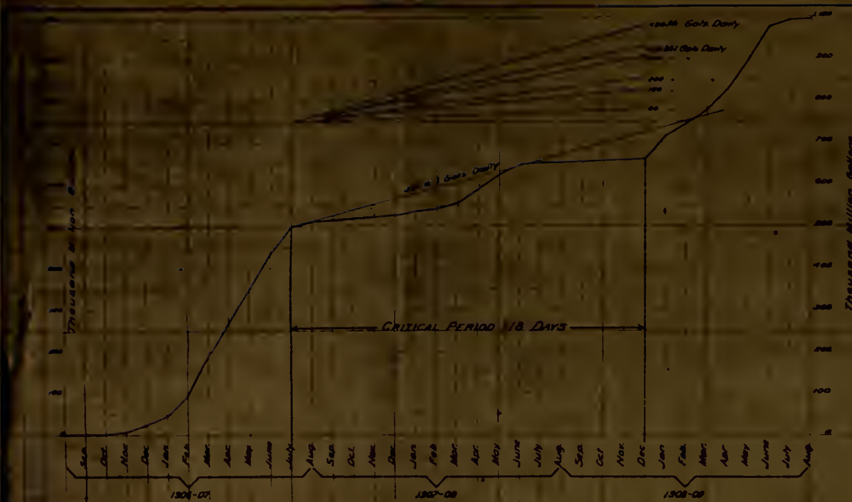
AREAS AND ISOHYETES OF THE SUBDIVISIONS

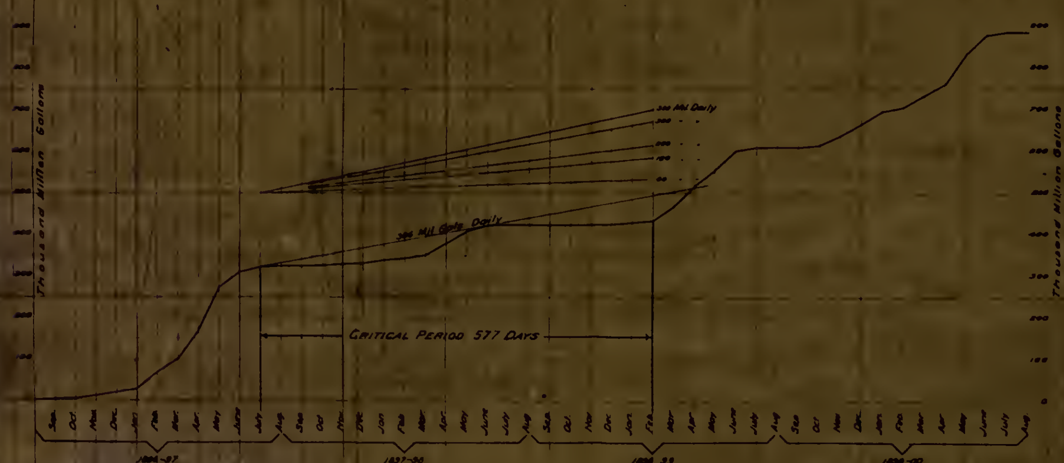
PREPARED UNDER THE DIRECTION OF MARSDEN MANSON, CITY ENGINEER

SAN FRANCISCO, CALIF. JAN. 1911.

Sheet 2

217





Evaporation at Lake Eleanor

Months	Seasons 1909-10	1910-11	1911-12
	Inches		
Sep		[illegible]	
Oct		[illegible]	[illegible]
Nov		[illegible]	[illegible]
Dec		[illegible]	[illegible]
Jan		[illegible]	[illegible]
Feb		[illegible]	[illegible]
Mar		[illegible]	
Apr		[illegible]	
May		[illegible]	
June		[illegible]	
July	[illegible]	[illegible]	
Aug	[illegible]	[illegible]	
Total		[illegible]	

Table of All Known Developed and Possible Storage Reservoirs Giving Costs of Dams

Name	Elevation	Hight of Dam	Storage Mil Gals	Cost of Dam Dollars	Cost per Mil Gals Dollars	Area of Water Surface	Remarks
Rail Road Flat Res	2200	325'	20900	4560,000	218.00	544 A	[illegible]
No1 North Fork "	2900	325'	27508	5710,000	208.00	736	
S.F. Gas & Electric Developed		5 Res	8050	805000	100.00	949	S F Gas & Electric Co
" " " Clover Valley	7400	165'	7500	1125000	50.00	600	
No2 North Fork Res	3850	(300')	16700	3340000	200.00	[illegible]	
Total			80658	15540000		3279 A	

Note. The other water rights in addition to the Wood Bridge Canal Rights are
20 mil gals daily to Jackson and vicinity from Amador Canal
10 " " " to Volcano Ditch
16 " " " to Mokelumne Hill and Campo Seco Ditch
10 " " " to Cranke Ditch
56 mil gals Daily

Board of Public Works
City and County of San Francisco, California.

Mass Diagram of the Water Available at Electra

After Allowing for Wood Bridge Canal Rights From Drainage Area of the

Mokelumne River

Tributary to Electra
537 Sq. Miles.

Prepared Under the Direction of Marsden Manson City Engineer
By M. J. Bartell
March, 1912.

Note. The Wood Bridge Canal Rights are about 62 Sec ft of the natural flow of the stream near Clements.

Sheet 3

LEGEND

No. & Sign of Route	Route	Proposed by	Remarks
1	Tuolumne River Project	Grunsky & Hunt	
2	Stanislaus " "	Grunsky & Swayne	
3	Mokelumne " "	" "	
4	Sacramento " "	Hazen	
5	Mount Diablo Route	Swayne	Surveys for 1238A
6	Altamont Summit Route	Grunsky & Hunt	" " 1283

BOARD OF PUBLIC WORKS
CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA.

REGIONAL MAP

SHOWING THE

LOCATION OF CONDUITS

FROM DIFFERENT SOURCES OF WATER SUPPLY FOR

CITY OF SAN FRANCISCO.

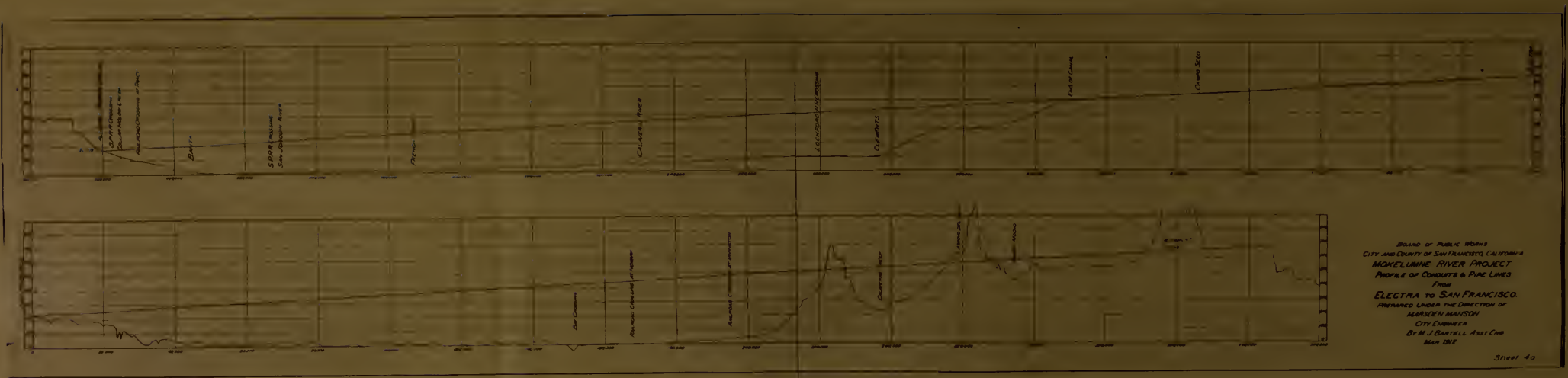
PREPARED UNDER THE DIRECTION OF MARSDEN MANSON CITY ENGINEER.

JAN. 1912.

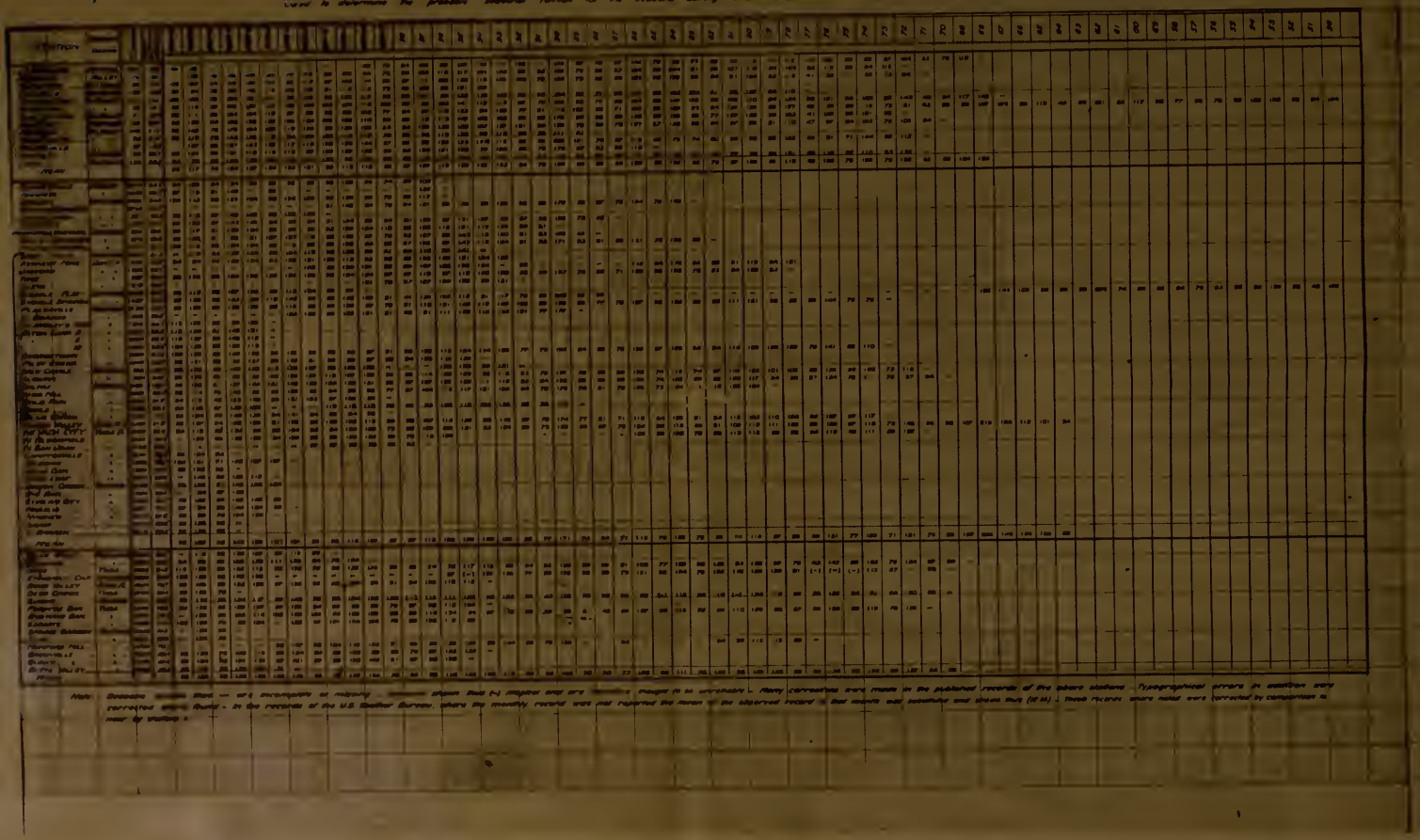
Scale in Miles

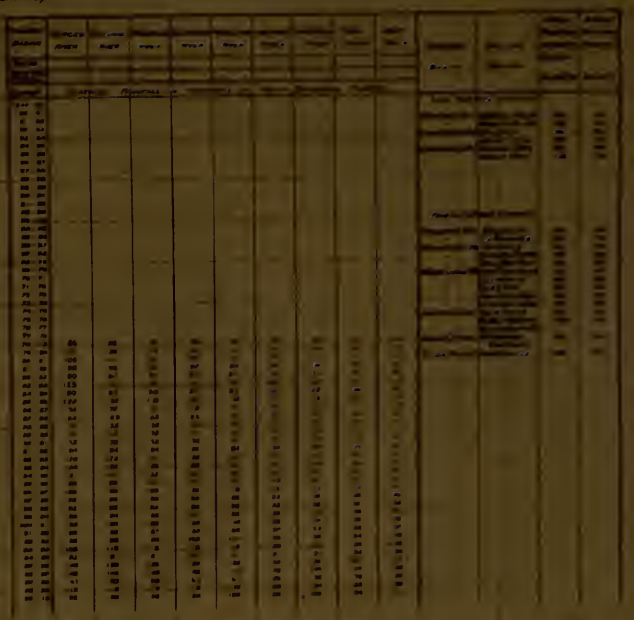
0 5 10 15 20 25

Sheet 4.


Board of Public Works
City and County of San Francisco, California
MOKELUMNE RIVER PROJECT
Profile of Conduits & Pipe Lines
From
ELECTRA to SAN FRANCISCO.
Prepared Under the Direction of
MARSDEN MANSON
City Engineer
By M. J. Bartell, Asst. Eng.
Mar. 1913
Sheet 40

TABLES SHOWING SEASONAL RAINFALL AS PERCENTS OF THE DECILED SEASONAL RAINFALL FOR THE PAST 61 SEASONS (1849-50 TO 1909-10) FOR THE RAINFALL STATIONS AND THE DRAINAGE BASINS
Used to determine the probable seasonal runoff for the seasons during which runoff was observed for the various drainage Basins For the Drainage Basins mean seasonal rainfall was given from Map A



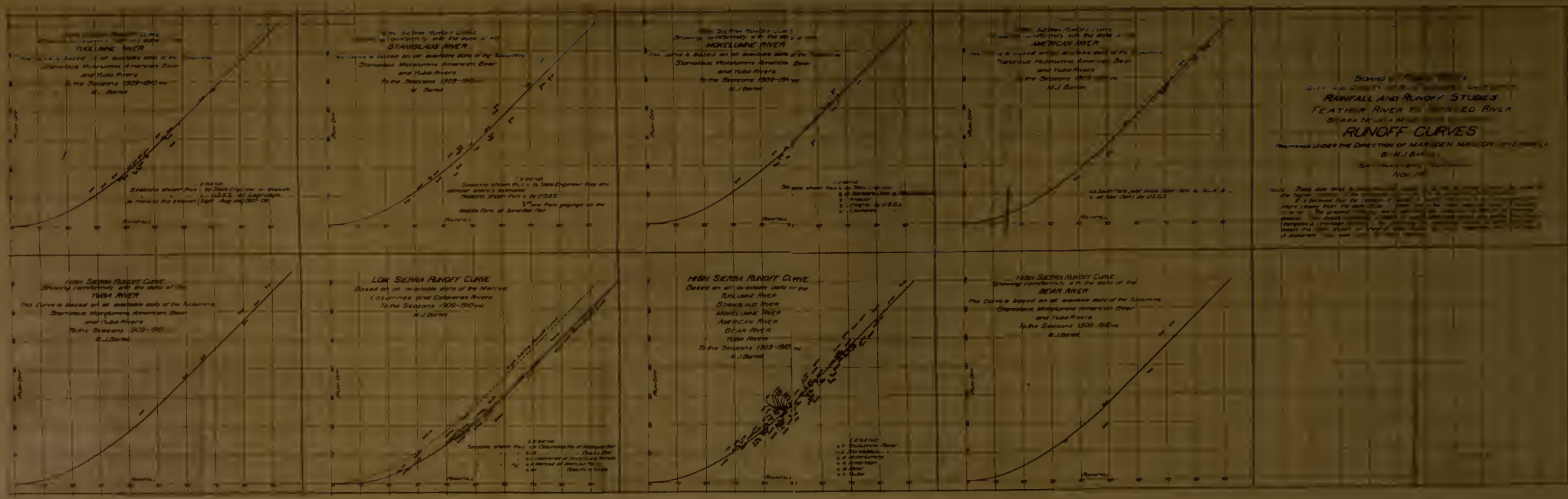


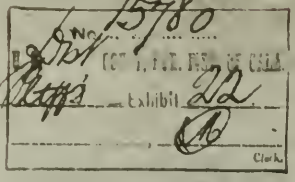
BOARD OF PUBLIC WORKS
CITY AND COUNTY OF SAN FRANCISCO CALIFORNIA

RAINFALL AND RUNOFF STUDIES
FEATHER RIVER TO MERCED RIVER INCLUSIVE
SIERRA NEVADA MOUNTAINS, CALIFORNIA

PREPARED UNDER THE DIRECTION OF MARSDEN MANSON, CITY ENGINEER
BY M J BARTELL
SAN FRANCISCO CALIFORNIA
JAN 1911

SHEET No 2


MOKELUMNE RIVER
STANISLAUS RIVER
MORE LAKE RIVER
AMERICAN RIVER
RAINFALL AND RUNOFF STUDIES
RUNOFF CURVES
LOW SIERRA RUNOFF CURVE
HIGH SIERRA RUNOFF CURVE
BEAR RIVER
YUBA RIVER
RUN-OFF
RAINFALL


No. 1578
Exhibit 22
Clerk.

No. 2672

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

EXAMINER PRINTING COMPANY, a Corporation and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

VOLUME II.

(Pages 225 to 455, Inclusive.)

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

[Stipulation as to Matter Appearing on Cover of Bartell-Manson Report.]

It is stipulated by counsel that the matter appearing on the cover of said report in the following language:

> "NOTE.—This report does not allow for waters needed by 200,000 A. of irrigable land mentioned in the Grunsky report of July, 1912.
>
> BARTELL."

was placed on said report in the month of July, 1913, just prior to the time when said report was sent to Mr. O'Shaughnessy in Washington.

[Further Testimony of Plaintiff.]

The plaintiff further testified that the original Bartell-Manson report was never delivered to the Advisory Board of Army Engineers nor to the Secretary of the Interior of the United States. It further appeared in evidence that Marsden Manson, in April, 1912, was incapacitated by illness from further performing the duties of his office as City Engineer, and Mr. C. E. Grunsky was employed by the City and County of San Francisco to make studies of the Mokelumne River and other sources of water supply for the purpose of supplying data to the Advisory Board of Army Engineers; further that John E. Freeman, a consulting engineer, was employed by the City and County of San Francisco to assemble said data and to present the case of the City and County of San Francisco with respect thereto, to the Secretary of the Interior and the Advisory Board of Army Engineers. Said report

of said Freeman, entitled "The Hetch Hetchy Water Supply for San Francisco" was offered and received in evidence on the part of the plaintiff, and the following extracts therefrom read to the jury:

Extracts from Report of John E. Freeman.

"THE MOKELUMNE RIVER AS AN ALTERNATIVE SOURCE TO THE TUOLUMNE.

[188]

The Mokelumne is next in the order of proximity to the Tuolumne after the Stanislaus. The possibility of its use by San Francisco has several times been brought forward by promoters and has received some publicity thru the advertising of the claims by the Sierra and Blue Lakes Water Company, that it could provide the City of San Francisco with an adequate Supply of water, coupled with an electric power project from which the income would pay a profit on the whole enterprise.

THIS SOURCE SEVERAL TIMES INVESTIGATED FOR SAN FRANCISCO AND REJECTED.

The City Engineer, Mr. Manson, happened to have made brief studies and an adverse report on these Mokelumne sources six years previously, but conformably to the request of Secretary Ballinger began further investigations, comprising surveys of the principal reservoir sites named by the present promoters. Upon Mr. Manson's disability by illness, already referred to, the continuation of the Mokelumne investigation was turned over to Mr. C. E. Grunsky, who had himself studied this river as a possible source for San Francisco eleven years

ago and also had been familiar with many of its features from boyhood, his early home having been in Stockton. Mr. Grunsky's full report, prepared in July, 1912, was filed with the Advisory Board of Army Engineers under date of August 1, 1912, in triplicate, comprising, with appendices, 174 typewritten pages and numerous tables and diagrams. The following is a very brief abstract of the report as filed. Copious extracts from it are presented in Appendix 18.

In the report filed Mr. Grunsky notes that the possibility of supplying San Francisco from these sources was investigated by Col. G. H. Mendell (Municipal Reports 1876–77), and refers to his own investigation of 1901 and to that of these Mokelumne sources made for City Engineeer Woodward in 1906.

All of these previous investigations had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky evidently was impressed with the unwisdom of spending any large sum of money at the present time for further field work in detail, and so bases his statement upon the facts already on record. Moreover, there was not time for any extensive new field work after Mr. [189] Grunsky was called in to take up the work which Mr. Manson had not completed at the time of his illness. I have not visited this region myself, but have carefully reviewed the data presented by Mr. Manson and Mr. Grunsky, . . .

To these I need only add that an inspection of the large scale map makes plain the fact that all of

the advantages of damsite, length of aqueduct quality of storage reservoirs, future water power possibilities, and the great advantage of not having to seek some additional source, at a time when sources equal to those now available are impossible to obtain, are all so plainly and strongly on the side of the Hetch Hetchy and Upper Tuolumne that I do not believe it advisable to expend the $15,000 to $30,000. more or less, which exploration and complete surveys for thoroughly working out the best possible project for a municipal water supply from the Mokelumne would cost."

The witness Taggart Aston having testified that following the discovery by him of the so-called Bartell-Manson report in the City Engineer's office, he had disclosed the fact of that discovery to members of Congress of the United States, and further, that the report had been discovered by him about June 13, 1913, and that the Public Lands Committee of the House of Representatives had convened about the 23d of June, 1913, counsel for the plaintiff asked the witness the following question: [190]

"MR. BLAKE.—Q. I will ask you now to state what considerations moved you to make any communications which you may have made to members of Congress in relation to this report."

Counsel for the defendants objected to said question as immaterial, irrelevant and incompetent, calling for the opinion and conclusion of the witness, and for a state of mind that these defendants could not be bound by, unless the matter appeared of rec-

ord with the public action of the witness. The Court overruled said objection and Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 31.

The said question the witness answered:

"My main reason, although I had several reasons, was the fact that I had received from Mr. Wilsey copies of, I think, two letters from gentlemen, one in London and another in Paris, in which they said that they had heard—they were connected, they were Mr. Wilsey's associates who were going to endeavor to finance this proposition and were therefore greatly interested—in which they said that a Mr. Freeman had made a report and that they both intended writing to Mr. Freeman, and they were anxious to see his report, so that they would get information from that source as well as from my report. Now, upon an examination of the Freeman report, I found that Mr. Freeman, not only in his own report, but in his discussion of other reports—both in discussion and in extracts from other reports which were included in his main report, had grossly misrepresented the Mokelumne supply to such an extent that it would have been quite impossible for us to have financed our project in France, particularly when such an eminent gentleman as Mr. Freeman, and who was so well-known in Europe, had made statements that there was not the supply that I in my report had claimed. I concluded that Mr. Freeman, being an eminent engineer and myself only a comparatively obscure

engineer, I concluded that his report would be given much greater weight than mine. I knew from my own surveys, as well as from the suppressed report, as well as from conclusions of Mr. Manson, that this supply was sufficient and that there was the water there. I therefore came to the conclusion that in duty to my clients these misrepresentations had to be removed and that the Freeman report had done my clients very grave injustice." **[191]**

The plaintiff on cross-examination further testified that when he stated in his letter of June 24, 1913, to Mr. Scott Ferris, Chairman of the Public Lands Committee, "I am sure that this act of trickery should prompt your committee to grant opportunity and time for the most rigid inquiry as (to what) in ordinary business life might be termed the city's attempt to loot the Nation of Hetch Hetchy under false pretenses," he intended to convey what he felt at the time he was testifying; that he had asked to delay the Hetch Hetchy matter and for the appointment of a commission to hear him and to hear all the injustices that were committed by endeavoring to secure the Hetch Hetchy matter by gross misrepresentations and trampling upon the rights of the owners of other properties. He also testified that he had never seen Mr. Grunsky's full report to the Board of Army Engineers on the Mokelumne supply, and that when he made the charge against the City of San Francisco as above stated he had many other reasons than that the Bartell report had not been

presented as such to the army board. That among such other reasons were the following:

Absolute gross misrepresentation of his clients' property in the Freeman report; that the Bartell report was not the only circumstance, that it was the culminating circumstance that made him feel indignant.

That he considered that, as the Secretary of the Interior had specifically appointed the army board for a certain purpose and as that purpose was to discover if any other source plus Lake Eleanor was available to the City of San Francisco, Hetch Hetchy should only be included as an absolute necessity; that he knew that Mr. Grunsky had made a report which dealt only with the Mokelumne, but that his making the charge that [192] the Bartell-Manson report had been withheld from the Army board had nothing whatever to do with the Grunsky report; that this Bartell report, of which he had a photographic copy, contained a most essential statement made by City Engineer Manson after he and his assistants had been working on it for two years, which he considered a very conclusive and valuable statement for the owners on the Mokelumne River; that the reason why he did not look at the case for San Francisco as presented to the Board of Engineers in the shape of Mr. Grunsky's report, was because he saw a condensation of that report in Mr. Freeman's report, and he felt sure that if Marsden Manson's statement in effect had been repeated in Mr. Grunsky's report, it should have been repeated in the Freeman re-

port; that he considered Mr. Manson's statement the essential part of that report.

The plaintiff also testified on cross-examination that he had read the letter of the Chairman of the Board of Army Engineers in which the latter had stated that if he had seen the Bartell-Manson report it would not have made any difference in the result, and that he (the witness) considered it very regrettable that a man in Colonel Biddle's position should have made such a statement, and that the letter in which it was made was purely self-serving.

On redirect examination the plaintiff testified that he called the letter of Colonel Biddle to Mr. Kent, of July 31, 1913, a self-serving statement, because when Colonel Biddle made the statement that even if the board had had the Bartell report it would not have altered their views, he had never seen the report and so stated later in his letter. The witness also testified that he considered the Bartell-Manson report should have been treated as the report of Mr. Manson [193] because he had corrected it, and notated it, and given his conclusion on it, and initialed it and passed it for final typing.

The witness was asked for other and further considerations upon which he based his statement that the representations of the city in relation to the Mokelumne supply constituted a looting of the Nation of Hetch Hetchy, he had drawn from the Freeman report, which was in evidence as "Plaintiff's Exhibit 36." Whereupon the following occurred:

"The WITNESS.—A. This on page 160 of the report. I think you read this, Mr. Blake. Do you

wish me to point out the significant parts in it here?

Mr. BLAKE.—Q. State in your own way what other considerations moved you to make the representation that the city's report of the availability of the Mokelumne was prejudiced and biased and unfair? A. You have already read this, but I will read the parts of it to which I wish to refer.

> 'The City Engineer, Mr. Manson, happened to have made brief studies and an adverse report on these sources six years previously.'

There is a conclusion to be drawn from that. The only mention they make of Mr. Manson having made a report was a mention that he had made an adverse report six years before.

> 'But conformable to the request of Secretary Ballinger began further investigations, comprising surveys of the principal reservoir sites named by the present promoters.'

Those were the surveys from which the alleged suppressed report was deducted.

> 'Upon Mr. Manson's disability by illness, already referred to, the continuation of the Mokelumne investigation was turned over to Mr. C. E. Grunsky.'

Now there, I find out that Mr. Marsden Manson's report on the outside is referred to as passed for typing, and in the body of the report Mr. Manson comes to a definite conclusion.

> 'Who had himself also studied this river as a possible source for San Francisco eleven years ago and also had been familiar with many of

its features from boyhood, his early home having been at Stockton.'

Now there again—and I am subject to correction in this statement from Mr. Grunsky, himself, **[194]** but my information is that Mr. Grunsky—

Mr. BLAKE.—Don't state any hearsay at all. The only deductions you are allowed to draw are those from the report.

A. (Continuing.) Then I will not state that, because it is hearsay.

'Mr. Grunsky's full report, prepared in July, 1912, was filed with the Advisory Board of Army Engineers under date of August 1, 1912, in triplicate, comprising, with appendices, 174 typewritten pages and numerous tables and diagrams. The following is a very brief abstract of the report as filed. Copious extracts from it are presented in Appendix 18.

'In the report filed Mr. Grunsky notes that the possibility of supplying San Francisco from these sources was investigated by Col. G. H. Mendell (Municipal Reports 1876–77), and refers to his own investigation of 1901 and to that of these Mokelumne sources made for City Engineer Woodward in 1906.

'All of these previous investigations had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky evidently was impressed with the unwisdom of spending any large sum of money at the present time for fur-

ther field work in detail, and so bases his statement upon the facts already on record.'

Now, here it is stated that Mr. Grunsky does not consider it wise to spend any more money on field work, although for the purposes of a report I consider that the plans and documents that accompany the Bartell report were very full and complete, and from them could be deducted the amount of water that Mr. Bartell calculated. There was really more than Mr. Bartell calculated. From his own tables it could be deducted quite correctly. Mr. Freeman says that Mr. Grunsky was impressed with the unwisdom of spending any more money. This is Mr. Freeman's statement in regard to Mr. Grunsky's report:

Q. He uses the word 'evidently,' there, does he not? A. Yes, that is the word that is used.

The COURT.—Q. In other words, Mr. Freeman makes the statement there that Mr. Grunsky evidently feeling that it was not worth while making any further investigation in the field, had based his conclusions in the report to the Army Board upon the data and reports previously had and existing in the office?

Mr. BLAKE.—Yes.

The COURT.—I suppose that would include the Mandell report and the six years previous report of Mr. Grunsky (Mr. Manson) and other data.

The WITNESS.—Well, not the Bartell report.

The COURT.—I did not say the Bartell report, I say the Mendell report. **[195]**

The WITNESS.—Because his conclusions do not agree with that report.

Moreover, there was not time for any extensive new field work after Mr. Grunsky was called in. As a matter of fact, they had been working something like two years on it. The plans I have date away back to 1910—from 1910 up to the time that the Bartell-Manson report was written in April, they had been working on surveys and plans. Mr. Grunsky (Mr. Freeman) states here there was not any time for any field work after Mr. Grunsky was called in to take up on the work which Mr. Manson had not completed at the time of his illness.

Mr. BLAKE.—You have made a mistake there in the name.

The COURT.—You stated 'Mr. Grunsky states'—you mean Mr. Freeman states. A. Yes, Mr. Freeman states. I will point out that it is stated here, and I would consider that the public would infer from this statement that there was no report from Mr. Manson and that it was not completed, whereas, as a matter of fact, that report was passed by Mr. Manson for typing under his own initials, and was a completed report.

Mr. BLAKE.—Q. Now, pass from that on to other considerations which moved you to make the criticisms upon the city's report on the Mokelumne? A. He goes on to say:

> 'I have not visited this region myself, but have carefully reviewed the data presented by Mr. Manson and Mr. Grunsky.'

The next page is 160-a of the Freeman report:

'The following table, taken from Mr. Grunsky's report, is of interest as giving an idea of the known storage possibilities of the Mokelumne watershed without any claim that this list of constructed and possible reservoirs is complete.'

In the list of reservoirs given he sums up the total amount of available storage as 65.23 billion gallons. That is about 65 1/4 billion gallons. Mr. Bartell gets over 80 billion gallons in his report and in his plans; Mr. Grunsky only puts it 65.23. I know from my deductions that there are something like 110 billion gallons of storage available. Q. In the entire Mokelumne supply? A. The entire Mokelumne catchment. Q. Pass on to the next.

The COURT.—We cannot spend too much time on this matter. The fact is that in a large part it has all been gone over before.

A. On page 160b, Mr. Grunsky found 39 billion; Mr. Manson's map shows 26.8; and I find 41.5.

A. (Continuing.) On page 160c:

'Mr. C. E. Grunsky concludes that it is in all probability not practicable to obtain more than **[196]** 60 mill. Gals. daily from the Mokelumne.'

Mr. Bartell obtained 305 million gallons per day and he deducted compensation water, most of which is purchaseable.

Mr. Bartell further finds, on his Railroad Flat diagram, . . . From his diagram it can be

clearly shown that his figure for that year for the upper catchments, the same catchments that I had in my report calculated on, that there would be 366 million gallons per day availible.

Mr. BLAKE.—Q. Now, pass on to another point.

A. Mr. Grunsky at page 160d, calculates for 60,000,000 gallon per day supply, to be pumped to an elevation of 200 feet in San Francisco,—that is a pumping project,—$30,179,903. I most distinctly state that 60,000,000 gallons of water per day can be brought into San Francisco, not by the pumping, as stated by Mr. Grunsky here, but by gravity for the sum of $16,700,000—and a gravity supply, at that.

Q. I will ask you to confine your consideration to a comparison between the Grunsky report and the Bartell report and the facts shown by the Manson report.

A. Mr. Freeman states, on page 160d,

> 'That the unit prices adopted to this modification have been modified to conform as nearly as practicable to those adopted by Mr. Freeman, but states that lack of time forbade going into details.'

That shows they did not give the proper amount of time to a consideration of the Mokelumne project and therefore should not have given it a black eye. Then with regard to the estimate, which I have previously mentioned, he states that

> 'It is inconceivable that further exploration would cheapen the estimate for these particular structures.'

That shows that it is his absolute opinion that that estimate could not be cheapened and yet, Mr. Blake, I would take the contract to-morrow for $16,700,000. Now here is where he hurts us, because undoubtedly—

Q. Just mention those considerations which show the discrepancy in the Freeman analyses of Mr. Grunsky's report in comparison with the Manson report.

A. Mr. Freeman states here as Mr. Grunsky's conclusion, page 160e, clause 2:

> 'The Mokelumne River should not be regarded as available to supply the full amount of water that will undoubtedly be required in the future, from remote sources, for the use in bay region. The limit may, for the present be placed at about 60 million gallons per day.'

That is in entire conflict with Mr. Marsden Manson's [197] statement in the Bartell report, in which he states that the Mokelumne River, if all rights be acquired, is available for that purpose. The next one is simply a difference in the capacity of reservoirs. There is another point: His estimate of the Mokelumne cost is very much too high. He used a most unfair comparison in his unit prices. The largest item in the dam is concrete.

The COURT.—You say his estimate for the Mokelumne—you mean for the expense of it, do you?

A. Yes, as compared with Hetch Hetchy, his comparisons were most unfair, indeed, and were injurious.

The WITNESS.—(Continuing.) Mr. Freeman estimates in detail the cost of Hetch Hetchy. He shows the cost of sand, and of everything else. He shows how he makes up his figures of $4.75. Mr. Grunsky though, merely puts down the figure of $9. It makes a difference of $4,600.000.

Mr. BLAKE.—Some question has been raised on cross-examination as to the value that would be obtained by your clients in the resale of this property to the city. I would like to have you explain to the jury what element of value and what the amount of it was you had in mind as growing out of the doing of the actual construction work?

A. Can I refer to my report?

Q. Yes, you can get your report, because I will want to question you about it.

A. My idea in the project I outlined for the foreign capitalists was to construct the work in units. Originally, from the data I got from Mr. Sullivan, my figures and ideas and everything else were very much exaggerated. When I examined it myself, as I report here, I say that my ideas are much more conservative. The construction recommended in the first unit—because, of course, whatever other units were put in afterwards would depend on whether it was for power or irrigation—I say the construction recommended in the first unit was for an expenditure of $8,143,171 for hydro-electric power and irrigation, of which $1,500,000 was to be for the irrigation works, for irrigating, I think, about 50,000 acres. We proposed to buy the

land at from 15 to $23 an acre, and to sell it for as much as we could get for it.

Mr. BLAKE.—Take the whole property en masse and explain to the jury, with the idea you hold towards its development at the time you made your report, what the increment in value would have been over and above the cost of improvements: that is, its capitalized value and its earning capacity?

The COURT.—Just state your theory.

A. The net valuation of the first development by construction, that is, with an expenditure of something over $8,000,000 would give us a capitalized value of a little over $22,000,000.

Q. Now, Mr. Aston, for the enlightment of any of the jury who may perhaps, like myself, be somewhat uncertain about what we are to understand by that term 'capitalized value,' will you distinguish [198] between construction value and capitalized value. What do you mean by the term capitalizing its earning capacity?

A. Its earning capacity multiplied by 20—20 years at 5 per cent; that is, the gross amount that a dividend of 5 per cent would be obtained upon.

Q. That is what financiers call net capitalization?

A. Yes, and we create that value for our constructed works. Therefore the value to my clients by an expenditure of $8,000,000 would have represented an increase in value of over $22,000,000 for the first unit. The other units I need not go into. That gives the jury an idea of what the other units *might*. It would be probably 3 times as much for

the complete development, which would take probably 10 or 12 years to construct it as it would be required.

Mr. BLAKE.—Q. Now, Mr. Aston, that answers that question. At all the times you were engaged in formulating the details of this plan and building up the capitalized value in your mind, according to the way you have testified, did you have in mind that in the event the city of San Francisco should desire to use this Mokelumne source of water supply, the city would have the right to expropriate it, that is, to obtain it under eminent domain?

A. Yes, sir, under eminent domain.

The COURT.—Q. As I understand you, the attitude of mind actuating you throughout your activities in this matter with which you were investigating this property and making the report which you now hold in your hand was that the real value of this property to your clients, or anyone seeking it for like purpose, was its availability as a hydro-electric property, and for irrigation purposes.

A. And for water supply, too, sir, if we could sell the water supply, but we did not wish to sell the property; we would sell the water, but not the property.

Q. But the idea that you rejected and refused to entertain was that it would not be to the interest of any one developing this property that the property assets should be sold for the purposes of a water supply? A. For the principal purpose?

Q. Yes.

A. If we could have seen our way to make a profit for a water supply, to sell it per thousand gallons—

Q. (Intg.) That is not what I am saying. I say the idea you rejected all the while was the idea of having the tangible and physical properties devoted merely to a water supply for a city.

A. Yes, sir.

Q. Your idea was, as I understand it—and I am simply asking so that I may understand your attitude correctly, your idea was that there was far more on this property to be developed as an enterprise for hydro-electric purposes, for irrigation purposes, and for the supply of water by the gallon to the municipalities.

A. Yes, sir, that was my idea. If a poor man had this property, your Honor, and was burdened with assessments on it, and was not able to develop it, had not the necessary 8 or 10 million dollars to [199] develop it himself, then of course his policy would be to sell it to San Francisco. But if gentlemen like these—financiers—were to take it, then they could increase their capital by putting in large amounts of money into construction work, which would give them large net current valuations.

Q. And as I understand you, you make the property in that way much more valuable for investment purposes than simply the buying of it to sell to a city for a water supply?

A. Ever so much so. If the city of San Francisco wanted those rights, they could enter condemnation proceedings. The bondholders were tied up

for $200,000. The Sullivan stock could have been purchased for $15,000. The City of San Francisco in condemnation proceedings would probably not have had to pay more than 300 or 400 or $500,000, unless they went into it (in a different way) a business man would go into it.

Q. I understand your attitude.

A. I may say that we always had the idea. The figure of a million and a half given to Mr. Wilsey was only a tentative figure, so that we would have something to talk on to Sir Robert Perks in New York in that month of March. Our whole idea was to get Sir Robert Perks to finance this and then we would make an attempt, as we did in May—in May we could have bought that property by buying off the bondholders and giving some stock—

The witness further testified that at the time he was making these representations against the good faith of the city engineers of San Francisco, first to Mr. Kent and afterwards to Mr. Ferris, he knew that Mr. Wilsey only had a three months' option on the Mokelumne properties. [200]

Thereupon the witness, Taggart Aston, testified that on July 16, 1913, he had sent a letter to the Honorable George E. Chamberlain, Chairman of the Public Lands Committee of the United States Senate. Said letter was introduced in evidence, and reads as follows:

[Letter, Dated July 16, 1913, from Taggart Aston to George E. Chamberlain.]

"San Francisco, Cal. July 16th, 1913.

Hon. George E. Chamberlain, Chairman, Senate Public Lands Committee, Washington, D. C.

My dear Sir:

Further to my telegram to you of yesterday:

The order of the Secretary of the Interior, dated May 27th, 1910, granting the City of San Francisco, a continuance of hearing to June 1st, 1911, in the matter of showing why the Hetch Hetchy Valley and Reservoir site should not be eliminated from the permit to the City, of date May 11th, 1908, contains the following paragraphs:—

'Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco to furnish necessary data and information to enable the Department of the Interior to determine whether or not Lake Eleanor Basin and watershed contributary, or which may be contributary thereto, together with all sources of water supply available to said city will be adequate for all present and reasonable prospective needs of said City of San Francisco and adjacent bay cities without the inclusion of Hetch Hetchy Valley as a part of said sources of supply; and whether it is necessary to include said Hetch Hetchy Valley as a source of municipal water supply for said City and County of San Francisco and bay cities.'

'In granting said postponement and continuance it is understood said City and County of San Fran-

cisco will at once proceed, at its own expense and with due diligence to secure and furnish to said advisory board of Army Engineers all necessary data upon which to make the determination aforesaid.'

'Said Advisory Board of Army Engineers is hereby authorized to procure such independent data and information as it may deem necessary or proper to a full and complete determination of the matters committed to said board and the Secretary of the Interior for determination, and that said Board may call upon the Geological Survey or other bureaus of the Department of the Interior for such assistance as any such bureau may be able to render in the premises.'

'It is further understood that said City will, as soon as practicable, submit to said advisory board a full exhibition of its proposed plan of development and [201] utilization of water under said permit, together with estimates of cost thereof, and also a full statement of all outstanding water rights, both for irrigation, power and other uses on the Tuolumne River and Lake Eleanor Basins and the proposed method of providing for the protection thereof.'

In compliance with the obligations imposed in this order, the City of San Francisco furnished the Army Board with the following documents relating to the proposed supply from the Mokelumne River.

Maps of Surveys of Reservoirs at Railroad Flat on the South Fork, and at Blue Creeks on the North Fork of the Mokelumne River.

The continuance of the hearing beyond the date first set, June 1st, 1911, was necessary to permit of the extension of these records through the dry season and for the gathering of much other necessary data, principally as to the availability of reservoirs and their capacities.

The subsequent postponements to March 1st, to June 10th, and, later, to November 25th, 1912, were necessitated by the inability of the City Officials to get their own and their consulting engineer's reports and statements in shape for presentation on an earlier date.

In accordance with an order of the Secretary of the Interior dated May 28th, 1912, there was filed reports on the 'various sources of supply'—the only one of these dealing with the Mokelumne Supply being that by C. E. Grunsky, Civil Engineer, filed with the Army Board on August 1st, 1912.

This report concluded that the limit, for the present, of the Mokelumne Source, of supply should be placed at sixty million gallons per day. The findings with regard to this and other matters being most inaccurate and preposterously misrepresentative and unfair to the Mokelumne Source.

Mr. Freeman and the Army Board largely based their findings on this false report, and were unaware that there was in existence another report, dated April, 1912, made by Mr. Manson, City Engineer of San Francisco, and his Assistant Mr. Bartel, which was accompanied by numerous and elaborate maps and diagrams, and which contained the following conclusions:—

'The Critical period, August 1907, to December, 1909, inclusive—518 days, 222,408—518—432 million gallons daily draft available to San Francisco, provided all rights and all reservoirs be secured and utilized, this source, under this assumption is sufficient to meet the demands of the region around the Bay of San Francisco when reinforced from a full development of Lake Eleanor.' This assumption having been arrived at only after the City Engineers had made surveys and examinations and had complied elaborate Maps and data, and was made in spite of the fact that the City Officials were notoriously in favor of having Hetch Hetchy granted.

The above-mentioned report was carefully suppressed by the City Authorities, and was not submitted to the Army Board, as undoubtedly the above and other findings [202] would have led the Army Board to have reported against the granting of Hetch Hetchy National Park to the City.

The manner in which this report was found and how the City further endeavored to prevent public access to it are partly described in my letter to the Chairman of the Congressional Committee of Public Lands, dated July 8th, 1913. Since my exposure of this report the City Officials have been exhibiting a copy of it, from which the most essential statement contained in the original has been omitted.

Mr. Judell, the President of the Board of Public Works of San Francisco, refused to produce this report before me in his office and gave as an excuse for not doing so—'that he did not wish to help the opponents of Hetch Hetchy'—after I had explained

to him that my reason for wishing to see it was to prove the charge made to me by the President of the Board of Health of San Francisco, Mr. Barendt, that in the copy of the suppressed report shown him on the 8th inst., the most essential part, i. e., the statement of the City Engineer—'that this source was sufficient to meet the demands about the Bay region' had been omitted.

I have no doubt but that there will be at least two sources proven more economically available, and giving as pure a mountain supply as Hetch Hetchy.

Owing to the false representations made by the San Francisco City Authorities to the Army Advisory Board, and to their suppression of favorable data which should have been submitted to this Board, the Press, the Nation and the Government, who left the supplying of data in good faith to the City, have been woefully deceived, and the properties of the proponents of other Sierra Sources have been seriously depreciated in value.

The deception is also a crime against the people of San Francisco as they have been forming their judgment upon false and inaccurate reports given out by the City, and have come to believe that Hetch Hetchy is the only source available.

I visited the City Hall on the 12th inst. in company with W. H. Hart, formerly Attorney General for the State of California, and Mr. C. Burleson, Civil Engineer, and asked to see the original Bartel-Manson report. We were shown a copy, and in confirmation of the charge previously made to me by the President of the Board of Health, Mr. Barendt,

we also found that the most essential conclusion of the report, i. e. the statement of the Mokelumne River 'is sufficient to meet the demands of the region around the Bay of San Francisco when reinforced from a full development of Lake Eleanor' had been omitted therefrom.

We asked the Assistant City Engineer for the original which we allege contained this statement, but he said apparently it had lately been sent to Mr. O'Shaughnessy, and they could not produce it. I can prove that it was in existence several weeks ago.

Regarding the City's representation to the Congressional Committee that there was a water shortage in San Francisco, and that it was necessary to obtain Hetch Hetchy at once, by rushing the Bill through the [203] present extra session in order to remedy this, I can only brand this statement as a deliberate misrepresentation, meant to deceive the public and the Congressional Committee, as the Spring Valley sworn statement for May, shows some 400 days supply in their storage reservoirs, and in addition they have over 400 days supply stored in their transbay underground gravels, or some 2 1–2 years supply in store, even if another drop of rain did not fall in the meantime. The failure to give sufficient supply in some districts being explained by the fact that the City's service pipes are insufficient.

Even if there was a shortage threatened, the quickest and most economical remedy would be the development of a further unit from Spring Valley

Sources, from which sources it is claimed that up to 210 million gallons per day can be ultimately be developed—41 1-2 million gallons per day being the present draw-off to San Francisco, In fact San Francisco must get a large increase of water supply from near-by available sources long before we could bring water from Sierra Sources, even if all legal obstructions were removed now.

It is a recognized axiom of Justice, that, upon fraud and deception having been proved, the '*Statu-quo*' should be assumed.

The United States Government will not disappoint the Nation in the present instance and a rigid inquiry is asked before further consideration of the Hetch Hetchy matter. And we hope that adequate time will be furnished us to complete data in proper shape.

I enclose you copies of correspondence had with the Hon. Scott Ferris, Chairman of Public Lands Committee, the most essential of which I note are not included in the first section of the 'Official Record' of the hearing—a copy of which I have received today. I would respectfully ask you to include these and any other communications had with me in the Official Minutes of your Honorable Committee.

In this matter, kindly disassociate me personally from Mr. Eugene J. Sullivan. The objections of my clients against the City's deceptive actions, are merely those which they have a right, as American Citizens, to place before the Government in order to overcome the effects of gross misrepresentations

made regarding their properties, and to ask for Justice.

Very respectfully yours,

TAGGART ASTON,
Consulting Engineer.

T. A.—D."

Thereupon, the following question was asked of the witness, Taggart Aston, by counsel for the plaintiff:

"Mr. BLAKE.—Q. Now I will ask you, Mr. Aston, to state briefly what you may have done in calling upon the city, as is stated here in this letter, in company with Mr. Hart and Mr. [204] Burleson, and state whether or not you were then shown a copy of the so-called Bartell-Manson report with the essential statement referred to in your letter here."

Counsel for the defendants objected to said question on the ground that it was irrelevant, immaterial and incompetent. The Court overruled said objection and Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 32.

To said question the witness answered:

"On account of my assistant, Mr. McCarthy, having informed me that he had noticed in the copy shown to him by Mr. Bartell that this essential statement, which of course was the whole gist of this report which had affected me in communicating with Washington—on account of Mr. McCarthy having told me that he had not seen his essential statement

(Testimony of Taggart Aston.)

in the copy which Mr. Bartell showed to him, I informed the president of the board of health, Mr. Barendt, who called at my office—I had never known him before, I informed him that I believed that the city was now showing a copy which they purported to be this report, in which they had eliminated this very essential statement made by Mr. Manson, the city engineer, Mr. Barendt, on the 8th of July, went up to Mr. Judell, his fellow official, and asked Mr. Judell— [205]

Mr. BARRETT.—Q. In your presence?

A. He informed me that he had gone up there.

Mr. BARRETT.—I move to strike that out.

The COURT.—Don't state anything said when you were not present. All that one is permitted to state on a matter of that is that by reason of what was told you you did certain things.

A. By reason of what was told me by Mr. Barendt on his return I requested Mr. Barendt to go back with me to Mr. Judell in order that I could further investigate what Mr. Barendt had told me regarding it, which coincided with what Mr. Bartell had told me. Mr. Judell had shown Mr. Barendt this report. I went with Mr. Barendt to Mr. Judell's office. Mr. Barendt introduced me to Mr. Judell.

The COURT.—Q. Who was Mr. Judell?

A. Mr. Judell was the president of the board of works. He was at the head of all the engineering department. As the chief official, responsible for the city, I told Mr. Judell that I would like to see this report, as I wished, if I found this elimination

(Testimony of Taggart Aston.)

had been made, I wished to make the charge that the elimination had been made. I asked Mr. Judell would he kindly do as he had done with Mr. Barendt, show me that report as the chief of the public works department and chief of the engineers' department. Mr. Judell said, 'I will not show you that report, because we are not going to help the enemies of Hetch Hetchy.' Then I asked Mr. Judell would the engineering department show it to me. He said he could not speak for the engineering department. I then reminded Mr. Judell that it had been said before the—

Mr. BLAKE.—I don't think you should state those matters of hearsay.

A. On account of that, I asked Mr. Barendt to come up with me to the engineering department. Mr. Barendt said, 'No, this will get me in bad with the department if I pursue this matter any further.' "

[Testimony of Arthur H. Barendt, for Plaintiff.]

The plaintiff was here withdrawn and Arthur H. Barendt called as a witness on behalf of the plaintiff. Mr. Barendt testified that in the month of July, 1913, accompanied by the plaintiff, he had called upon Mr. Judell, President of the Board of Public Works of the City of San Francisco; that he had introduced **[206]** Mr. Aston to Mr. Judell and that Mr. Aston had asked Mr. Judell for the original Bartell-Manson report. The witness testified that he had told Mr. Judell that he had not seen the original, but had seen a carbon copy, but that

(Testimony of Arthur H. Barendt.)

he understood there were some interlineations on the original; that thereupon a very warm discussion took place between the plaintiff and Mr. Judell the exact substance of which was that Mr. Judell stated that he was not going to help any opponent of the Hetch Hetchy proposition.

[Testimony of Taggart Aston, (Recalled), in His Own Behalf.]

The plaintiff being recalled, was asked the following question with respect to the so-called Bartell-Manson report

"Mr. BLAKE.—Q. State whether or not you had occasion to make any public statements with reference to the matter of this report and of your interest in disclosing the fact of it on November 5, 1913, before the Civic Center meeting at the St. Francis."

[207]

Counsel for the defendants objected to said question upon the ground that it was incompetent, immaterial and irrelevant, hearsay and *res inter alios acta.* The Court overruled said objection and counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 33.

To said question the witness answered:

"I had asked Mr. O'Shaughnessy to give me ten or fifteen minutes to look into the Mokelumne matter, and I told him that I thought that after he had heard and seen my data on it I was sure that he would personally remove the misrepresentations made regarding it in the previous report. This was

(Testimony of Taggart Aston.)

in a conversation over the 'phone. It was either the day before or two days before the Civic Center meeting. Mr. O'Shaughnessy replied very sharply that he was too busy, he would give me no time. As this was the first public meeting at which anyone had an opportunity to remove certain misconceptions that had been planted in the people's mind by the fact of the newspapers not publishing anything but one side of the matter, I therefore decided that it was the proper opportunity for me to tell the public my view of the question, especially as the 'Examiner' and others had referred to me as Mr. Sullivan's engineer and had connected me with him in the matter, and in a manner that I did not approve of. I therefore wrote out a speech which I delivered at that meeting. It was a meeting at which both sides were heard, and at which discussion was had on the various papers. I therefore wrote out a speech and delivered that speech. I afterwards had it printed and sent it to each of the Senators before this libel was published. I have an acknowledgment from senators in regard to having received the printed document which is a true copy of the written-out speech that I had made at the time."

Thereupon, the following questions were asked of the witness by counsel for the plaintiff and the following proceedings occurred: [208]

"Mr. BLAKE.—Q. Did you make this statement from a written statement that you had?

A. Yes, I read it, I read every word of it.

(Testimony of Taggart Aston.)

Q. The public statement is a transcript of that statement?

A. The public statement was taken from the printed manuscript you have there (referring to a manuscript in the possession of counsel for the plaintiff).

Q. Did you make a statement at that time concerning your personal interest? A. Yes, sir.

Q. What was the statement you made with reference to your personal interest?

Mr. BARRETT.—That is objected to as immaterial, irrelevant and incompetent, not sufficient foundation laid, and *res inter alios acta.*

The COURT.—The testimony tends to show that the representatives of the 'Examiner' were present and that the city officers were there, that is, I mean the city engineer and the attorney.

Mr. BARRETT.—There has been no proof, as I recollect it, that there was any representative of the 'Examiner' there. There is proof that on the next day the 'Examiner' had an item that there was a meeting held.

The COURT.—That would be a circumstance from which the jury might infer that the 'Examiner' was represented there.

Mr. BARRETT.—Is sufficient foundation laid? They are introducing hearsay and *res inter alios acta* testimony. Has there been a foundation laid? The foundation laid is that on the next day the 'Examiner' had an article about that meeting.

The COURT.—I think it is sufficient to admit the evidence."

(Testimony of Taggart Aston.)

Thereupon, counsel for the plaintiff offered in evidence an article on page 6 of the San Francisco "Examiner" of Thursday, November 6, 1913, under the heading, "Water Plan Views Aired by Outsiders."

Counsel for the defendants objected to the introduction of said article upon the ground that it was immaterial, irrelevant and incompetent, *res inter alios acta,* hearsay, and without sufficient foundation for its introduction, and not relating to any of the issues involved in the action. **[209]** Thereupon, before the ruling of the Court upon the objection, the following occurred:

"The COURT.—Does it purport to be an account of this meeting?

Mr. BLAKE.—Yes, including an account of the speakers who were present, and who spoke on this subject. It is only for the purpose of giving basis for the inference which the Court has said is a proper one for the jury to draw. The question upon which it is material is the negative proposition that this witness' statements were wholly ignored and no comment made upon them."

Thereupon, the Court overruled the objection of counsel for the defendants to said article, and admitted the same in evidence. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 34.

Said article is as follows:

[Extracts from San Francisco "Examiner" of Thursday, November 6, 1913.]

"WATER PLAN VIEWS AIRED BY OUTSIDERS.

Miller of McCloud River and McDonald of Eel River Say Hetch Hetchy is All Wrong.

CITY ATTORNEY GIVES FACTS.

Long and Engineer O'Shaughnessy Show 'Visitors' Where They Are Late in Their Protests.

C. H. Miller, engineer for the McCloud River water project, and Henry M. McDonald of Stockton, who said he had none but a sociological, disinterested, patriotic interest in the Eel River water project, appeared on the same stage with M. M. O'Shaughnessy, the city engineer, and Percy V. Long, the city attorney, in the ballroom of the St. Francis Hotel last night at a meeting of the San Francisco Civic Center, to discuss the Hetch Hetchy water supply.

Miller of McCloud river, and McDonald from Stockton were most earnest in their efforts to show the large audience of San Franciscans that they and their fellow-citizens who voted overwhelmingly for the **[210]** Hetch Hetchy plan, and the many engineers who have recommended it, and the board of army engineers who set the seal of their disinterested indorsement upon it, and the geological survey, and the House of Congress, and Gifford Pinchot, and the Secretaries of Agriculture and of the

Interior, who, or which, have supported Hetch Hetchy, were all quite wrong, and that the McCloud or the Eel River was obviously the source for this city's water.

PITY THE POOR SECRETARY.

Nobody present last night, when all was over, could possibly have been in the position which City Engineer O'Shaughnessy stated that Secretary of State Bryan was in last year, at the banquet given by James D. Phelan in Washington, at which banquet, said O'Shaughnessy, Bryan asked the Californians whether 'Hetch Hetchy' was the name of an Indian tribe, or dance, or medicine, as it seemed to him he had been hearing quite a lot about it, and had got to wondering what it could mean.

The city engineer and the city attorney were equally as earnest in showing those present that Miller from the McCloud River and McDonald from Stockton might possibly be wrong in attacking Hetch Hetchy.

The city engineer, indeed, who opened the discussion, had the audience excited and expectant, perhaps even hopeful, for a few minutes when after warmly praising the Hetch Hetchy plan, he said vehemently 'And now for a word or two about our opponents!' and at the same time reached behind the speaker's table and picked up a shillela about the size of a small telegraph pole and waved it as if

Donnybrook Fair were about to be opened.

All that the city engineer wanted with the club, however, was to use it as a pointer in explaining his

diagrams. But Mr. McDonald from Stockton took occasion to remark when he got to his part of the discussion that he wanted no personal quarrel with anybody. He was disinterestedly interested, patriotically and sociologically, in the Eel river, and that was all.

MILLER CRACKS ALL HEADS.

Miller of the McCloud river project was frankly its chief engineer, and made no bones of cracking all the heads in sight that had anything to do with Hetch Hetchy, on the straight proposition that the McCloud river project, which was turned down by the Army Board, was the better project just the same, as the Army Board had *ran* short of lead pencils and had been obliged to quit its work of investigation when it had spent its appropriation, without really covering the ground. Without a supply of lead pencils it could not keep in business. As for Hetch Hetchy, Miller of the McCloud river wondered where they were going to get any water at all up there.

At the end of the attempts made by the proponents of McCloud river and Eel river to convert the rather languidly interested San Franciscans present, Percy Long good-humoredly explained his view that it was [211] rather futile at this stage of the proceedings, when Hetch Hetchy was practically assured, for McCloud river and Stockton, or the Eel river, to be so anxious to have San Francisco change its mind.

With which opinion the audience seemed to agree,

with the exception of a few who had come along to boost the Eel river, and one solitary and poetical-looking young lady who loudly applauded the reading of a long telegram from Richard Underwood Johnson, the magazine poet, denouncing the Hetch Hetchy project on the ground that it was robbing nature, and perhaps would stop the tourists from going to the valley.

A speaker later on said that the tuorists who annually got to the valley numbered about two hundred.

An incident during the discussion claimed the attention of everybody present when, after Percy V. Long, City Attorney, had referred to the activities of Eugene J. Sullivan in Washington on behalf of the Blue Lakes proposition, as enough to make any San Franciscan ashamed of him, a pretty young girl in the center of the hall rose and said:

'I am Miss Sullivan; are you referring to my father?'

Long said that he was certainly referring to Eugene J. Sullivan, if that was the young lady's father's name and, in spite of his deference for the fair sex, would have to repeat his former statement.''

The witness having testified that at the Civic Center Meeting at the St. Francis Hotel on November 5, 1913, he had made a statement to substantially the same effect as his testimony on the stand, but that there was something else stated by him at the meeting not testified to by him on the stand, the following questions were asked of the witness by coun-

sel for the plaintiff, and the following proceedings occurred:

Mr. BLAKE.—"Q. Did you make any statement at that time and place with reference to the fact that this supply from the Mokelumne had been discriminated against in various city reports?

Mr. BARRETT.—I object to that on the same grounds."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the [212] defendants hereby designate as their

Exception No. 35.

To said question the witness answered: "Yes, sir."

"Mr. BLAKE.—Q. State in what points you made the statement that the supply had been discriminated against?

Mr. BARRETT.—The same objection, your Honor."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 36.

To said question the witness answered:

"I stated that the city's reports had been biased in that they made unfair comparisons, they minimized our sources, supplies and estimates of our sources and exaggerated the estimates of other sources and thus made a false and unfair comparison with the Hetch Hetchy project. In particular, I mentioned one instance where in Mr. Freeman's report, in a very essential item, the item of concrete in

the Hetch Hetchy dam as compared with the Mokelumne dams, he priced the Mokelumne dam—

The COURT.—Now, this matter is wholly immaterial."

Thereupon, counsel for the plaintiff offered in evidence an article in the San Francisco "Examiner" of November 30, 1913, with reference to the proposed publication of the Washington edition of said "San Francisco Examiner." Thereupon, the following occurred:

"Mr. BARRETT.—What is the particular purpose of that?

Mr. BLAKE.—For the purpose of characterizing the publication and its circulation.

Mr. BARRETT.—In so far as this might be an attempt to prove by this ex parte declaration of one of the defendants that Mr. Hearst got out the Washington edition, we object to it. I notice that in that article counsel is going to read some stuff with reference to the part that Mr. Hearst would have in that Washington issue. [213]

The plaintiff further testified that he first came into personal touch with the properties of the Sierra Blue Lakes Water and Power Company through a Mr. Hopley who told him that Mr. Sullivan had an important water project that could be used for hydro-electric purposes, and that thereupon the plaintiff took the matter up with Mr. Sullivan and later referred the matter to Mr. William J. Wilsey of Portland, Oregon, in a letter dated February 26, 1913, reading as follows:

[Letter, Dated February 26, 1913, from "T. A." to W. J. Wilsey.]

"Mr. Wm. J. Wilsey,

Portland, Oregon.

Dear Mr. Wilsey:—

I have your letter of the 24th inst. I wired you last Monday as per enclosed confirmation [214] as am anxious you should spare some time to look into several large projects, which are, briefly, as follows:

(1) A large real estate buy in San Francisco. This is probably the finest real estate proposition in California to-day. I am now trying to make arrangements so that you may get it first hand.

(2) Hydro Electric (over 200,000 H. P.) and Irrigation project, plus some 60,000 acres in California.

(3) Ocean Terminal, Dock, Warehouse and factory project with some 800 acres of land on San Francisco side of Bay.

(4) Water rights, Irrigation, 160 miles of Railway, and over 100,000 acres of land in California. Will require some $150,000 to tie up and handle within the next nine months. Arrangements have been made to bond all lands as soon as they are tied up.

I have not made any commission arrangements for myself on any of these matters, but would ask you, should you fancy any of the above when presented, to insist that such reasonable arrangements shall be made before taking them up, as it is not at all times

easy to decide upon the form of commission until matters have been fully discussed.

I have not received any definite instructions to go ahead with the Key Route plans, but am working away at them as time will be short to get them into anything like proper shape, and will be glad to have Mr. Sumner's advice when putting the finishing touch on them.

Yours very truly,

T. A."

Plaintiff further testified that on March 19th, 1913, he had obtained from Eugene J. Sullivan the document which was introduced in evidence, marked "Plaintiff's Exhibit 11," which reads as follows:

[Plaintiff's Exhibit No. 11—Letter, Dated March 10, 1915, from Eugene J. Sullivan to Taggart Aston.]

"San Francisco, Cal., March 10, 1913.

Mr. Taggart Aston, C. E.,
Foxcroft Bldg.,
City.

Dear Sir:

In the event of any business being done by our Company with Mr. Wilsey, we will pay you a commission of ten per cent on the amount received to be paid as received and in kind.

This is not an option of the Company's properties, but it protects you in case any business is done through Mr. Wilsey.

Sincerely yours,

EUGENE J. SULLIVAN,

President Sierra Blue Lakes Water & Power Co."

[215]

Plaintiff further testified that he notified Mr. Wilsey by wire that he had received the commission agreement and later received from Mr. Wilsey a letter dated March 14, 1913, relating to various propositions, among others the Blue Lakes proposition. The portion of the letter dealing with the latter proposition is as follows:

"Re Blue Lakes proposition, please say to Mr. Sullivan that I desire that you and he get together all data, and statement signed by himself as I outlined to you, and send all documents here as quickly as possible as I shall be leaving direct for New York upon the 20th or 21st. I would like to take these documents with me."

Plaintiff stated that he made a preliminary statement on the Blue Lakes properties to Mr. Wilsey; that the statement was not properly a report because it was made on documents supplied to him rather than matters set forth as of his own knowledge. The statement was received in evidence marked "Plaintiff's Exhibit No. 18" and is as follows:

[Plaintiff's Exhibit No. 18—Statement, Dated March 19, 1913, from T. Aston to W. J. Wilsey.]

"San Francisco, Cal., March 19th, 1913.

To Wm. J. Wilsey, Esq.,
Portland, Oregon.

Re Sierra Blue Lakes Water & Power Co.'s Holdings.

Dear Mr. Wilsey:

As desired by you, I have gone into the questions involved in the above matter and beg to report to you in a preliminary manner as follows:

Watershed—671 square miles in El Dorado, Alpine, Amador and Calaveras Counties, State of California, at an elevation of from 2,500 to 8,000 feet above sea level.

Water Rights — 58,000 Miners' inches. Also United States Government license to flow water over Railroad Flat [216] reservoir. Third, a right of way for a canal from Railroad Flat reservoir to Rich Gulch Forebay. Fourth, 1,600 acres of land patented and applied for in sections 13, 19, 23 and 24, Township 6 North, Range 13 East, in Calaveras County. Fifth, 1,400 acres of land patented in section 25, Township 7 North, Range 14 East, and Section 30 and 31 in Township 7 North, Range 15 East, in Calaveras County, covering the middle fork of the Mokelumne River. Sixth, 40 acres of patented land at Rich Gulch, on which Forebay is located. Seventh, 10 acres for Rich Gulch power station. Eighth, ditch property known as Clark's Ditch, consisting of 55 miles of main ditch and laterals, with right to 600 inches of water located in 1856, and now a "going proposition" with one 28 acre reservoir near Railroad Flat, one 5 acre reservoir, and one small reservoir near Clark Homestead. Ninth, right of way over Government and private land from North fork of river via Bear Creek to middle fork of Mokelumne river for canal. Tenth, a United States Government license for North Fork reservoir, covering 1470 acres, with rights of way for canal. Eleventh, upper and lower Blue Lakes, located in Alpine County, with 4,000,000,000 gallons of water empounded. Twelfth, Case Valley reservoir and canals, a "going

proposition," main canal and laterals, 25 miles. Case Valley reservoir is now constructed, and the site at the head of Dry Creek reservoir also. Thirteenth, 340 acres patented land at Case Valley reservoir. Fourteenth, franchise for transmission and telephone lines through Calaveras County.

The Company can supply 397,000,000 gallons of water daily throughout the year, covering the waters that could be empounded behind these reservoir dams.

And other properties not included above and mentioned in Mr. Sullivan's letter to Mr. Wilsey and Mr. Burleson's printed report.

These properties and rights Mr. Sullivan has offered to you on behalf of his Company for $1,500,000.

They were previously offered to the City of San Francisco, for a Municipal Water Supply for $6,000,000. The authorities of that City, however, favored a supply from "Hetch-Hetchy," in the Yosemite National Forest, but it is doubtful if the Government will grant the permit for this. The Sierra Blue Lakes Cos'. Supply in conjunction with the American-Cosumnes project has been named by the U. S. Army Engineers' Board as the next in importance for supplying San Francisco and adjoining cities for next 100 years, the supply being even nearer to San Francisco than the "Hetch-Hetchy."

Sacramento, 60,000 population, Stockton, 35,000 population, Oakland and Berkeley, 250,000 population are cities now growing at the rate of from 50 to 90 per cent every ten years, and are also in the

market for a Municipal Water Supply. It is therefore reasonable to assume that at least 60,000,000 gallons per day (The Board of Army Engineers suggest 128,000,000 gals. per day) of the Mokelumne Supply will be diverted for this purpose.

I therefore suggest that the uses into which the [217] properties might be developed into a dividend paying proposition would work out as follows:

ESTIMATED COST.

Water-Supply for Municipal use 60,000,000 gallons per day—cost say...	$10,000,000
Hydro-Electric Power say 120,000 H. P. (incl. headworks & Dams for Water-supply) cost at $75 per H. P.....	9,000,000
Irrigation 150,000 acres at $18 per acres.	2,700,000
Purchase of, say, 100,000 acres of Valley lands, at present prices averaging $23 per acre	2,300,000
Water Rights and Properties.....	1,500,000
Total Cost of Development,	$25,500,000

The above would, of course, be developed in suitable units and does not fully represent the full limit to which the properties could be developed, but is a suggestion upon which to base a preliminary showing as to what future profits might amount to.

ESTIMATED PROFITS.

Water Supply—According to U. S. Census Bureau reports, the current value of a satisfactorily developed Municipal Water Supply in the Pacific Coast States amounts to $240 for 750 gals. per day of annual capacity, or Current falue of $19,200,000

for 60,000,000 gals. per day, upon which a dividend of 4½ to 5 per cent would be readily obtainable.

Water Power—The Board of Army Engineers conservatively estimate the Annual Net Profits per horse-power at $20 per H. P. On this basis, the annual profits of the project, fully marketed, would amount to $2,400,000 or a Net Current Value for a satisfactorily developed and Marketed Water Power, of $48,000,000.

Irrigation—Water for irrigation would be sold at, say $2.50 per acre per annum. It is usual to sell with land the right to use irrigation water at an annual rental for the latter. The purchaser also paying at the start, a lump sum representing his share of the original cost of Construction of ditches and laterals.

On 150,000 acres the annual rental would amount, therefore, to $375,000 less, say, $75,000 for management and upkeep—and would represent a net annual profit of $300,000—and current value for the Irrigation System of $6,000,000.

Profit on Land Purchase—The land proposed to be purchased at the present average price of $23 per acre, will retail, [218] subdivided and under irrigation, at an average selling price of $150 per acre. Deducting from this Overhead charges, commissions on sales, and original cost—say $37 plus $23 per acre, a profit of $90.00 per acre should be realized. Representing a net current value of $9,000,000.

The total *Estimated* net valuation, therefor, that might be expected from a carefully executed project would be as follows:

Water Supply	$19,200,000
Water Power	48,000,000
Irrigation	6,000,000
Sales of land	9,000,000
Current Net Value of Total Development	$82,200,000

In other words, the investment of $25,500,000 should yield 5% on $82,200,000 and should represent, after careful management within 6 to 8 years, a profit, if sold out, of some $40,000,000 to $45,000,000.

The Advisory Board of Army Engineers; Colonel John Biddel, Corps of Engineers, U. S. Army; Lt. Colonel Harry Taylor, Corps of Engineers, U. S. Army; and Colonel Spencer Cosby, U. S. Army (Major, Corps of Engineers) Value present Water rights of Blue Lakes Sierra Water & Power Co., for 128,000,000 M. G. D. Municipal Water Supply, at $3,000,000 (See p. 132 of Report of Advisory Board of Army Engineers on San Francisco Water Supply to the Secretary of the Interior, dated February 19th, 1913). The balance of the Company's filings and properties were not included, and this valuation represents the *Minimum* sum that an Arbitration Court would award the Company for its proportion of their property in its present undeveloped state.

Further the Advisory Board above mentioned (see p. 133 of their report) estimate the net value of the water power, when developed, at $20 per Horse Power, per year, and they capitalize it at 4½ per cent, equalling $450 net current value per Horse Power.

I am enclosing the following copies of Reports:

Exhibit "A"—Minutes of conference between Advisory Board of U. S. Army Engineers and Sierra Blue Lakes Water & Power Company at Custom House, San Francisco, Cal., July 5th, 1911.

Exhibit "B"—Extract from San Francisco Municipal Records, 1877–8.

Exhibit "C"—Report of Russell Dunn, C. E. 1908.

Exhibit "D"—Report of D. H. Fry, C. E. 1904.

Exhibit "E"—Report of C. M. Burleson, C. E. typed.

Exhibit "F"—Report of G. M. Burleson, C. E. printed.

Exhibit "G"—May of California, showing location of property. [219]

Exhibit "H"—Map showing Irrigation District.

Mr. Sullivan, President of the Company, informs me that two firms, one American and one Norwegian, are at present desirous of entering into a long contract for all of the Hydro-Electric Power that can be developed on the Company's property, for the purpose of manufacturing "fertilizer" on a large scale.

An income, probably sufficient to pay upkeep, taxes and interest, can be obtained from the present flow of the Mokelumne River for irrigation purposes previous to completion of the dams and the more expensive works.

I understand that Mr. Burleson has had charge of the Gaugings, Surveys and Engineering end of this project for many years. I would therefore feel inclined to place more reliance upon his report than

others. However, I consider the Estimates of cost in various reports to be somewhat low. And his estimates of probable yield of water are high as compared with those of the San Francisco City Engineers, whose conclusions and reports, however, seem to be based upon instructions or prejudice in favor of the "Hetch-Hetchy" project.

Yours truly,

T. ASTON."

The plaintiff further testified that shortly before the 15th of May he was informed by Mr. Harte Keatinge that Mr. Sullivan, in return for moneys advanced by Mr. Keatinge and his father, had given Mr. Keatinge and his father the control of the Sierra Blue Lakes property and was going to give them a power of attorney to deal with the properties; that at the instance of Mr. Harte Keatinge the plaintiff arranged a meeting in Portland with Mr. Wilsey and that the plaintiff, Mr. Harte Keatinge and Mr. Richard Keatinge, went to Portland.

There was here offered and received in evidence, a letter from Mr. Wilsey to the plaintiff, dated April 23, 1913, [220] reading as follows:

[Letter, Dated April 23, 1913, from W. J. Wilsey to Mr. Aston.]

"Dear Mr. Aston:

I am enclosing copy of letter just received from Mr. Wright of London. I sent this Paris gentleman copy of your report on Blue Lakes. He writes to Mr. Wright for further information. I cabled Mr. Wright today to hand him the documents you sent me. Please send me some more (3) copies of En-

gineers' reports, that circular containing report of all properties. Send me some newspaper clippings about Government turning down Hetch-Hetchy deal.

With best wishes, I am,

Yours truly,

WILLIAM J. WILSEY."

The witness further stated that the enclosure referred to in such letter was the letter from H. L. Turck to Messrs. C. Leary & Co., dated April 9, 1913, and reading as follows:

[Letter, Dated April 9, 1913, from H. L. Turck to C. Leary & Co.]

"9 April, 1913.

Messrs. C. Leary & Co.,
4 Lombard Court,
Gracechurch Street,
London, E. C.

Gentlemen:

I am duly in receipt of your letter of the 7th inst. Mr. Wilsey spoke to me about the matter of the 'Sierra Blue Lakes Water Co.' and sent me data regarding the same which I have looked over briefly as the translation from English into French had not then been made.

This deal seems to me to be of very large proportion, but its success, in my estimation, rests in the question of the furnishing of water to the City of San Francisco.

(A) Are there any assurances, or, at least, probabilities that a deal could be made with the city of San Francisco?

(B) Need there be no more fear of the competition of the Hetch Hetchy? A reply to this would be of service to me in order to form a preliminary opinion on this matter.

(C) Which is the electric railway that might be secured in this matter; is it constructed already or has it to be constructed; and all information as to its course, probable traffic, etc.

(D) What plan have you as to the financing of the Sierra Blue Lakes Water Co. deal in order to put it on a working basis?

As soon as I have the above information I could consult my friends here in Paris and let you know whether I have a chance to place the business.

Yours very truly,

H. L. TURCK." [221]

The plaintiff further testified that in reply to this letter he had written Mr. Wilsey as follows:

[Letter, Dated April 25, 1913, from T. Aston to W. J. Wilsey.]

"San Francisco, Cal., April 25, 1913.

Mr. Wm. J. Wilsey,
Portland, Oregon,

Dear Mr. Wilsey:

Your letter and enclosure of the 23rd inst., received late this afternoon.

As you may wish to cable replies to the Parisian gentleman's inquiries, I answer them (after collaboration with Mr. Sullivan) as follows:

A—Strong probability is that San Francisco and Bay cities will desire to adopt Blue Lakes Supply.

But profits are larger and more immediate in developing supply for nearer towns than San Francisco and developing power and irrigation. Parties are ready to take all water power and irrigation water than can be generated.

B—Government has consistently refused grant of Hetch Hetchy. New Secretary of Interior has concurred in ruling of former Secretary that the matter of granting Hetch Hetchy be decided by Congress. It is conceded that Hetch Hetchy will be denied.

C—Numerous Electric and other railways intersect district. Line referred to is 18 miles, is unimportant side issue in this project.

D—See Aston's report.

Kindly note that San Francisco or Hetch-Hetchy are not considered important factors with relation to developing Blue Lakes. My report to you leaves them out of the question—and estimated profits are based therein on water supply to Stockton and Sacramento and Hydro-Electric, Irrigation and Valley lands.

I am particularly anxious your associates should secure these rights and properties, and am sure you are doing all that is necessary to have them secure the option, when they will have six months to make detailed examinations and reports.

Yours very truly,

T. ASTON."

The witness testified that the specific paragraphs A, B, C and E in his letter to Mr. Wilsey, were the answers to the questions of corresponding letters in the letter of Mr. Turck to Messrs. C. Leary & Co.

The witness here testified that he recognized that [222] these gentlemen had in mind the furnishing of water to San Francisco, but that he had told them that he did not think it practicable and that he had made up his report with another object in view. He further testified that he at this end knew a great deal more about the matter than they did, and that his whole report was based upon his own policy and the policy he recommended.

There were further offered and received in evidence the following letters identified by the plaintiff as having been sent and received by the parties to whom and by whom they appear respectively to have been received and sent, it having been testified to by the plaintiff that all of said letters other than those addressed to the plaintiff, had been received by him as enclosures in letters to the plaintiff from William J. Wilsey:

Letter from H. L. Turck to Messrs. Leary & Co., dated April 28, 1913, reading as follows:

[Letter, Dated April 28, 1913, from H. L. Turck to Leary & Co.]

"Paris, France, April 28th, 1913.

Messrs. Leary & Co.,
4 Lombard Court,
Gracechurch St.,
London, England.

Gentlemen:—

I have your letter of the 25th inst. Re Blue Lakes. I would like very much to receive all documents that you have regarding this business. To start with, I think it would be well to have

First. Detailed program of all works to be done with cost of construction and probable time for construction.

Second. The estimate of profits of the exploitation.

Third. Financial project.

Really to make it possible for me to interest the Baron Reille and his associates in this business it is necessary that I can put before him all the information that I have asked you for above. That is to say, a well prepared plan of the project with regards to the technical and **[223]** financial side. In carefully preparing a resume of the Blue Lakes business with regards to these two points of view, so as to make my friends clearly understand the interesting part of this business, is the same time preparing for its success.

Awaiting your reply, gentlemen, and with my most cordial regards, I am.

H. L. TURCK."

Letter dated April 29, 1913, from H. L. Turck to W. J. Wilsey, enclosing a copy of the aforesaid letters from Turck to Leary & Co., dated April 28th, 1913, reading in part as follows:

[Letter, Dated April 29, 1913, from H. L. Turck to W. J. Wilsey (Part of).]

(Translation.)

"Paris, France, April 29th, 1913.

Mr. W. J. Wilsey,
Selling Bldg.,
Portland, Oregon.

My dear Sir:—

Re Blue Lakes. I received your kind letter of the

16th inst. and have just written to Messrs. Leary & Co. of London, according to enclosed copy. In fact I think that before presenting this important business to the Baron Reille and his associates it would be well to first make a general plan which outlines the whole question as regards the technical and financial part so as to show well all the advantages of the business."

Mr. BARRETT (after reading the foregoing, continuing to cross-examine the plaintiff).—Did that leave any doubt in your mind but that to sell this property along the lines that you and Mr. Wilsey had it you had to get Hetch Hetchy out of the way?

A. No, sir. We told Mr. Turck that Hetch Hetchy had nothing to do with our plans. In reply to those letters we disabused his mind altogether of Hetch Hetchy. I will show you very clearly by my letters which followed that, and by my report, that we endeavored to disabuse them of the idea they had got about it no doubt, San Francisco being a large city, San Francisco would loom up large in his mind. He was not acquainted with the details regarding hydro-electric power and irrigation and other matters here. There is no question, Mr. Barrett, but that the project looking to the greatest profits out of these property rights was the developmen of hydro-electric power, irrigation and water supply to small cities, where we could sell the water; but as I said before I had no idea and I would have scouted any idea of buying these properties for say a million [224] and a half and selling them for any other figure. Of course, Mr. Barrett we all like to

(Testimony of Taggart Aston.)

make money. Supposing such a deal had come up, I just like anybody else would have gone into it, but that is not the question. Such a deal was not to my mind in any way practicable, but the other was; it is the other deal that was the sole subject.

Mr. BARRETT.—Q. Then when you made your campaign at Washington against Hetch Hetchy and against the city getting it, did you have in mind at all that if you could accomplish that you could put your property in the position in which Mr. Turck of Paris inquired about and said was at the basis of the whole thing? When you were sending your telegrams to Washington you were not thinking at all of getting it in a situation that Mr. Turck was speaking of. . . .

A. I will answer it in this way: How long would it have taken for the Hetch Hetchy bill to have been thrown out? That would have been sometime in December. Mr. Wilsey's option expired on the 27th of August. As Mr. Wilsey explained, in reply to Mr. Turck's letter, he said that if there was any chance of selling to San Francisco that we—Mr. Wilsey, and Sir Robert Perks and others—would have no chance of getting the property. In that way he endeavored to disabuse Mr. Turck's mind as to the necessity for having Hetch Hetchy.

Mr. BARRETT.—Now, after discussing the proposition with you, that you were financially interested in a scheme that you knew had to do with getting Hetch Hetchy out of the way, I want to inquire, just very briefly, about the lines of activity you took in Washington. Without going to the

(Testimony of Taggart Aston.)

record may I say that your activity at Washington by telegram and by letter was too full; that in the one direction you were complaining of the suppressed report and the unfair treatment of your plan; that in the other you were making a very considerable and definite campaign against Hetch Hetchy. Now, does that summarize and properly characterize your general activity at Washington?

A. I am going to answer that exactly in the way I think you want it answered if you will allow me to epitomize my reply. I had two objects in my activity; one was a private one and the other was a public one. The private one I have in a way already explained but not as fully as I would have cared to. As to the public one, there were many reasons for the public one, that was the duty which an engineer owes to his profesison when he discovers that misrepresentations with regard to such a very important matter as that have taken place. I was aware, Mr. Barrett—I will tell you what was in my mind—I was aware that the Spring Valley Water Company was about to be purchased by the city. I was aware that Mr. Franklin K. Lane and others—it was stated, however, that it was going to be represented to the committee that here was a water shortage in San Francisco **[225]** and that for that reason this bill should be rushed through a session of Congress and through this committee. Now, that statement that there was a water shortage in San Francisco which called for an emergency measure in Congress, I considered one of the most diabolical things I have ever heard of because, Mr.

(Testimony of Taggart Aston.)

Barrett, I had had in my hands at the time I wrote to Washington the monthly sworn statement made to the Board of Supervisors of San Francisco which stated that there was at least something like two years supply on hand in the reservoirs for San Francisco and that—

The COURT.—Q. You mean the Spring Valley reservoirs?

A. The Spring Valley reservoirs had two years supply on hand when the city officials of San Francisco put the words into Mr. Franklin K. Lane's mouth. They made a most horrible use of that gentleman when they made him their mouth-piece in saying that babies were dying, the people could not wash their door-steps, and we must have this emergency measure. The letters that came back here from Mr. Scott Ferris in reply to the protests were all couched in the same language, that Mr. Gifford Pinchot and all those very eminent gentlemen had said that the people of San Francisco were dying for water and that only Hetch Hetchy would save them. The most infernal lie that was ever couched before a parliamentary body. What was the true condition of affiairs about this water shortage? It was because in one or two outlying districts there was a shortage of service pipes. I heard Mr. Rainey try to put the same argument before an audience with regard to water shortage and hence the need of Hetch Hetchy. Mr. Rainey was illustrating his argument by stating that in one outlying district the people had to be supplied by a

(Testimony of Taggart Aston.)

water-cart. Well, that argument was well answered when somebody in the audience asked him where they got the water to put in the water-cart. That was very nearly answering his argument. That was the situation in regard to Hetch Hetchy in Congress. I endeavored to expose that. I telegraphed to the chairman. I have in my possession a letter from the Vice-president of the Spring Valley water Company giving me all these details. I heard Mr. Dockweiler, the Consulting Engineer for San Francisco, say that the Spring Valley Water Company could be purchased by the city and it would give a water supply for the city for the next 100 years. I knew there was no need for the city to go to Hetch Hetchy, or to the Mokelumne or any other Sierra Source to the City of San Francisco. I can show you in my correspondence in which I say I was aware of that fact and communicated that fact to the Committee. And I consider, Mr. Barrett, that against all these tremendous powers I was acting with the highest motives when as an engineer, and when I felt indignant at this proceeding, I brought this to the attention of Congress. It was no pleasure for me to do so. I consider I was dragged into this matter. I did not want to get into it. In November—before this libel was published, I telephoned to Mr. **[226]** O'Shaughnessy and I said 'Mr. O'Shaughnessy, all I want in this matter is to have misrepresentations removed from the Mokelumne project, I think they have been unfairly treated, and I would ask you to give me 10 or 15

(Testimony of Taggart Aston.)

minutes of your valuable time in order that I may show you my data when I feel sure you will personally remove these misrepresentations.' I said, 'I don't wish to oppose Hetch Hetchy, it is not my wish in any way to do so.' Mr. O'Shaughnessy cut me short; he said: 'have no time to talk to you.' Then I prepared my speech for the following night, for November 5, before the Civic Center, and that has been already mentioned here.

The COURT.—Q. That was your public interest; you said you had a private interest?

A. Yes, that was for my clients, to remove the misrepresentations. If I had thought, Mr. Barrett, there was any chance to sell to the City of San Francisco I should have opposed it for that purpose, most undoubtedly. I am not a hypocrite, I am not hypocritical. If I thought my clients' interests lay in that end, I would have done so, I confess I would have done so for that purpose. But it did not. My mind is perfectly clear on that. I think when I read you my report even you will agree to that."

A letter from W. J. Wilsey to the plaintiff, dated May 10, 1913, the pertinent portion of which is as follows:

[Letter Dated May 10, 1913, from W. J. Wilsey to Plaintiff.]

"I have your kind favor of May 10th and note contents regarding Blue Lakes. I am sending copy of that portion of your letter to those who are now interested in the deal. Am also sending you a copy of a letter just received from Paris. I wish that

you, as engineer, would take up the questions and fully explain, and send me three copies, as soon as possible."

The latter letter enclosed aforesaid letter from Turck to Leary & Co., dated April 28, 1913.

Letter from the plaintiff to William J. Wilsey, dated May 15, 1913, reading as follows: **[227]**

[Letter, Dated May 15, 1913, from T. Aston to W. J. Wilsey.]

"San Francisco, May 15th, 1915.

Mr. Wm. J. Wilsey,
Portland, Oregon.

Dear Mr. Wilsey:—

With regard to Mr. Turck's queries—in order to prepare a report to fully answer his purposes, and one that I could stand by, would occupy considerable time, both in field and office, and would also involve heavy out of pocket expense. It would cost at least $2,500, to prepare this matter in the shape that I would wish to present it. The preliminary report which I have already prepared, together with the other reports submitted should serve to show what a complete project would cost and the profits that might be expected therefrom.

To reply to Mr. Turck's queries—My report to you, dated March 19th, gives the cost and profits as the project presented itself to me, without having made a detailed examination.

The expenditure of same $25,000,000 would be spread over a term of some eight to ten years. The first unit would be a Hydro-Electric Construction of 40,000 H. P. which would absorb $3,500,000, and a

further expenditure for purchasing and irrigating some 50,000 acres of land at a joint cost of about $2,750,000. Also the Cities of San Francisco, Oakland, Berkeley, Alameda, Richmond, Sacramento and Stockton, with their tributary population of some 1,500,000 people, are all running short of water, and are in the market for municipal supplies. The 'Blue Lakes' supply being the nearest Mountain Water Supply available for the cities named. However, as you are aware, the negotiations for these will be long drawn out affairs, and as there is plenty of immediate market for Hydro-Electric and Irrigation water, the present holders of Blue Lakes and Mokelumne River properties would not wait to dispose of their properties until such arrangements had been made. In fact, if they could be consummated at the present time, they would sell direct to the Cities and would ask at least $6,000,000 for their properties and rights as they now stand. The first unit of 40,000 H. P. would take some ten months to construct, and should have Gross Earnings of $1,000,000 per annum. The remaining units would be undertaken when and as demand would be made for water and power.

The financial project is one for much discussion and consideration, and in order to help matters along, I have arranged with Mr. Keatinge, of Richard Keatinge & Sons, Contractors, to accompany me to Portland to thrash these matters out and endeavor to arrive at a satisfactory and definite plan and conclusion.

The Keatinge's have been helping Mr. Sullivan

out financially, so as to pay all assessments and keep the properties together. Mr. Keatinge, Jr., is a gentleman of wealth and ability, and as he feels satisfied as to the standing of yourself and associates, [228] is willing to give his time and money to hold the project for us, and if necessary accompany you to Europe fully empowered to act as may be found mutually desirable upon your arrival there.

It may be possible to arrange matters so that no option money need be paid until matters have been well forwarded and your associates fully satisfied—but a thorough and reliable report and examination should at once be made. I am prepared to undertake this as soon as arrangements can be made—and would be glad if Mr. Sumner could afterwards go over and supplement or frank it.

You will have my telegram of even date, in which I state that Mr. Keatinge and myself will go to Portland on Saturday, if suitable to you.

It will be necessary to get San Francisco and Hetch Hetchy out of your associates' heads—the success of the project is not dependent on them.

Yours very truly,

T. ASTON."

Letter dated May 8, 1913, W. J. Wilsey to J. G. Wright, the pertinent portion of which is as follows:

[Letter, Dated May 8, 1913, from W. J. Wilsey to J. G. Wright.]

"Mr. J. G. Wright,
4 Lombard Court,
Gracechurch St.,
London, England.

Dear Mr. Wright:—

I have your kind favor of April 26th and note contents. Both of the questions you ask have been answered in letters you have no doubt received by this time. The electric road I referred to, to be presented in conjunction with the Blue Lakes project, is the California deal, not the Oregon.

No, there is no negotiations at present time with the City of San Francisco regarding water from Blue Lakes. If San Francisco had decided to take this water, it would be quite impossible for any of us to get the deal as it would be worth a great many times more than what they are asking for it. I think it is a first class proposition to take up and to pay the company the $10,000 asked for the option and then go on and finance it as it is not necessary to have San Francisco agree to accept this water as it will only be a few years until they have to come to it, as you will note by the enclosed clipping that they will not have water enough to supply the people in 1915." **[229]**

Plaintiff here testified that he did all he could to disabuse their minds of this matter—to put Hetch Hetchy out of their minds; he further said that Mr. Wilsey did not know as clearly as he did that San

Francisco had a supply that would serve its requirements for seventy or eighty years. The following then occurred:

"Mr. BARRETT.—Q. Just a line more in this same letter:

'I have just received a letter from Sir Robert Perks in which he says that he would like to know if the cities want to get this water before he goes any further with the deal. It seems to me he would like to have this placed before him on a golden platter, guaranteeing one hundred dollars for every dollar before he can see his way clear. In the event that San Francisco asks for this water neither Sir Robert or any one else could obtain it.'

A. Quite so. That is my point, Mr. Barrett."

Letter, H. L. Turck to W. J. Wilsey, dated May 23, 1913, and reading as follows: **[230]**

[Letter, Dated May 23, 1913, from H. L. Turck to W. J. Wilsey.]

"Dear Sir:—

I have received your letter of the 9th inst. I have made an appointment with Baron Reille for next week to talk over the business of the Blue Lakes and the Electric Railway.

I have noticed from the newspaper clipping that the people are afraid of a shortness of water for San Francisco during the Exposition of 1915.

To finance this important business it will in fact be necessary that we have a long term option, at least six months as you suggest. I have not received a copy of the letter from Mr. Sullivan, president of the company.

Yesterday morning I saw again Mr. E. Berg to whom I have spoken again about the Blue Lakes business. He has promised to send me tomorrow or Monday at the latest, privately, this report. According to what Mr. Berg told me, there would be several companies who intend to get water from the Blue Lakes or from the rivers which get their water from the Blue Lake, and if that is so it would naturally be necessary to have an option on the whole business to prevent competition which might cause trouble in the realization of this enterprise.

Mr. Berg told me also that a Mr. Freeman, Consulting Engineer in Providence, U. S., had also made a very extensive study regarding Blue Lakes and other water sources in California, and possibly it would be interesting for our business to get the documents regarding this big work that this engineer has made. In any case I thought it wise to post you on this.

I heard through Messrs. Leary & Co. that Sir Robert Perks had left for England on the 'Mauretania.'

As soon as I shall receive any interesting news I shall at once advise you.

Very truly yours,

H. L. TURCK."

Letter, George L. Wright to W. J. Wilsey, dated May 24th, 1913, and reading as follows:

[Letter, Dated May 24, 1913, from G. L. Wright to Mr. Wilsey.]

"London, E. C., 24th May, 1913.

Dear Mr. Wilsey,

We have a letter to-day from Mr. Turck, saying he has seen Mr. E. Berg, who has promised to send him his Report privately, to-day or Monday. Mr. Turck says he has spoken again to Mr. Berg about the Blue Lakes business, and he says a very complete survey of it has been made by Mr. Freeman Consulting Engineer, of Providence, U. S. A. He thinks it might be of interest for you to put yourself in communication with this gentleman, to whom moreover Mr. Turck himself is writing.

Yours sincerely,

GEORGE L. WRIGHT." [231]

Letter from the plaintiff to William J. Wilsey, dated July 14, 1913, reading as follows:

[Letter, Dated June 14, 1913, from Plaintiff to W. J. Wilsey.]

"San Francisco, Cal., 6–14–13.

Mr. Wm. J. Wilsey,

Portland, Oregon.

Dear Mr. Wilsey:—

I am sorry to note from your letter of the 13th inst., that you are not coming to San Francisco at this time, but trust you may soon be able to get away.

. . .

I am very busy with the Blue Lakes Report, it will be some ten days before it can be completed. As you are aware, the City are pushing the Hetch

Hetchy project before the Congressional Committee, by a fortunate circumstance I have been able to lay my hands on elaborate unpublished data and plans prepared by the City for Blue Lakes Project, which practically proves our case, and shows that they wrongfully held back the information. I shall be preparing a special Water Supply Report, but Mr. Keatinge is willing to pay for it. We would very much wish to consult with you before sending reports away, as there is a good chance to supply Sacramento with 40,000,000 gal. per day; also Stockton, Oakland, and Berkeley. And there is a question of getting an option to purchase a reservoir site on the N. Fork of Mokelumne River (now in other hands) which would cinch matters for us.

Yours very truly,

T."

Letter from R. W. Perks to William J. Wilsey, dated August 6th, 1913, reading as follows:

[Letter, Dated August 6, 1913, from R. W. Perks to W. J. Wilsey.]

"Brunswick House,
2 Central Buildings, Westminster, S. W.
6th August, 1913.

My dear Mr. Wilsey,

I duly received your letter of the 23d July yesterday and I have also got a very complete report made by Mr. Aston on the Blue Lakes Water Power Company and the irrigation scheme.

I note that your option to deal with this business expires on the 27th August.

I have written to Mr. Turck asking him whether

Baron Reille will be disposed to go into this business.

I feel however quite convinced that neither of these gentlemen can deal with the business, if at all, before the time of your option will expire.

Before cabling, however, to you on this subject [232] I prefer to wait until I hear from Mr. Turck which I shall hope to do to-morrow.

So far as I am personally concerned I am leaving town at the end of this week for a month's vacation which I badly need as I have been working at full stretch and it will be quite impossible for me to go into business with the necessary detail; but even if I did I have not got the local knowledge, neither am I sufficiently familiar with prices in California to give any intelligent personal opinion about this business.

As I have so often pointed out to you and to other friends of mine who come to me with various projects, my business is simply to construct, and sometimes assist in the finance, but I cannot undertake the business of promoting new enterprises.

Another difficulty and I think quite of an insuperable character at present is the great reluctance of any companies or banking and financial houses in London to undertake any business in connection with the new works whether railway, electric harbour or otherwise.

No matter how profitable or attractive such projects might be in normal times it is quite impossible at present to handle such business at all in London or indeed in Paris.

I greatly doubt whether we shall see the end of

this condition until next spring when the savings of our respective countries may have mounted up and people will be more inclined to look at new enterprises.

As you know also, several issues which have been made in London of American and Canadian enterprises have not turned out well and the investment market is therefore extremely cautious.

You will gather from what I say that I much regret that I do not know of any quarter in which I could assist you successfully to handle this special business.

Perhaps you will instruct me by cable what you wish me to do with Mr. Aston's report in the event of Mr. Turck coming to the conclusion that he and his friends cannot deal with the business.

Yours truly,

R. W. PERKS."

The witness further testified that at the conference in May, 1913, in Portland, between himself, Mr. Wilsey and the Keatinges, he was employed to make a report on the properties of the Sierra Blue Lakes Water & Power Company, and further that he felt that the report, to deal with the matters referred to in the foregoing letters, would cost about $2500, but that he had told Mr. [233] Wilsey that he would not charge such a sum if Mr. Wilsey would consider appointing him as engineer afterwards, or do his best to have him appointed, and also give him some small interest in his (Wilsey's) own profits out of it, that in such case plaintiff would do the work at cost plus a small per diem to cover necessary expenses.

Plaintiff further testified that the expense of the report was to be borne by Mr. Wilsey and the Keatinges in the proportion of one-half by each. The witness further testified that as agreed upon between him and the Keatinges in Portland, the object of the report was to show the availability of the properties for a hydro-electric irrigation project, and stated that in Portland they had talked of supplying Sacramento or Stockton, or Sacramento and Stockton if there was any water left over. The witness testified that he had made the report which was completed in July, 1913, and there was thereupon offered in evidence a copy of said report from which the following portions dealing with municipal water supply were read to the jury:

[Report on Properties of Sierra Blue Lakes Water & Power Co.]

"MUNICIPAL WATER SUPPLY.

The upper Catchment of the Mokelumne River was chosen in 1878 by the San Francisco Municipality as the Source of Water Supply for that City, but it was found that there was a State law at that time which prevented this being done.

San Francisco has of late years been seeking a Sierra Source of Supply. An Advisory Army Board was appointed to report to the Secretary of the Interior as to whether there were any other Sierra Sources combined with Lake Eleanor (already owned by the City) which would be sufficient to supply San Francisco for the next century. The object being, if other sources were found insufficient, to advise the Government as to whether Hetch

Hetchy Valley, part of a National Park, and an excellent reservoir site, should not be granted to the City. The City was asked to prepare all data and plans, for submission to the Army Board with regard to other sources. The City Engineer prepared elaborate plans, diagrams and report of the Mokelumne Source, and in this report, dated April, 1912, the following conclusion was arrived at:—'The Critical period, August, 1907, to December, 1909, inclusive'= 518 days, 224,408 divided by 518 equals—432 million gallons daily draft available to San Francisco (from Mokelumne River). Provided all [234] rights and all reservoirs are secured and utilized this source under this assumption is sufficient to meet the requirements of the region around the Bay of San Francisco when re-inforced from a full development of Lake Eleanor."

As the City officials were notoriously in favor of having Hetch Hetchy granted, the above report was suppressed and was not submitted to the Army Board, but an Engineer of the City was employed to prepare another report in which he concluded that —'it *is all* probability not practicable to obtain more than 60 million gallons daily from the Mokelumne.'

Only those acquainted with the unreliability of San Francisco Municipal Departments at the present time, and particularly in the past, can understand reasons for such misrepresentations.

The matter of the suppression of this report has been presented to the Congressional Committee dealing with the Bill proposing to grant Hetch Hetchy to San Francisco, and will later be taken up with the

Federal Senate Committee. But the City has brought powerful political influence to bear, and it is feared that the injustice may not be righted, although a rigid inquiry has been asked for.

However, even under the most favorable conditions it is extremely unlikely that the San Francisco authorities would purchase the Mokelumne properties for some time. And the objections made against City's actions have been those which one would naturally put forward in order to rehabilitate the value of their properties and overcome the effects of misrepresentations made regarding them.

The Mokelumne River is most favorably situated as a Sierra Source to supply Sacramento (50,000 population), Stockton (30,000), Oakland, Berkeley, Alameda and Richmond (combined population, 250,-000), all of which towns are looking for and are urgently in need of a Sierra Source of Water Supply.

I have not taken the question of Municipal Water Supply into account in estimating profits, but in the hands of a financially strong company the Mokelumne River Source would be the most logical to which the tributary Municipalities would look to for a Water Supply.

According to the U. S. Census Bureau Reports, the current value of a satisfactorily developed Municipal Water Supply in the Pacific Coast States amounts to $240.00 for 750 gallons per day of Annual Capacity, or current value of $19,200,000 for 60,000,000 gallons per day, upon which a dividend of 4½ to 5 per cent should be obtainable. The avail-

able supply for this purpose amounting up to 350 million gallons per day from a Mokelumne Source."

Thereupon, counsel for the plaintiff offered in evidence an article in the "San Francisco Examiner" of November [235] 30, 1913, with reference to the proposed publication of the Washington edition of said "San Francisco Examiner." Thereupon the following occurred:

"Mr. BARRETT.—What is the particular purpose of that?

Mr. BLAKE.—For the purpose of characterizing the publication and its circulation.

Mr. BARRETT.—In so far as this might be an attempt to prove by this ex parte declaration of one of the defendants that Mr. Hearst got out the Washington edition, we object to it. I notice that in that article counsel is going to read some stuff with reference to the part that Mr. Hearst would have in that Washington issue. [236]

The COURT.—The jury could only regard it as affecting the defendant who would be bound by the publication. There is no evidence here before this jury so far as to any particular connection, that is, business or otherwise, with the Examiner Printing Company *of* its codefendant William Randolph Hearst. There is no evidence to show that he is in anywise connected with it. Mere popular rumor is not a matter on which a jury can proceed in finding a verdict. There is nothing to connect in a business way the defendant Hearst with his codefendant. So that anything of this kind that purports to emanate from the Examiner Printing Company could

not be permitted to affect Mr. Hearst unless it was connected up.

Mr. BLAKE.—I will read the deposition of—

The COURT.—Do you offer that paper?

Mr. BLAKE.—I offer the paper in evidence, yes.

The COURT.—It is admissible as to the defendant who publishes it.

Mr. BARRETT.—Yes, your Honor. We object to its being admitted at all, or the parts of it which relate to any participation therein announced that the other defendant—Mr. Hearst—might be going to have in the Washington issue.

The COURT.—That might be a different thing. If it contains statements which purport to connect the defendant Hearst with the Examiner Printing Company, the other defendant, it would have to be connected up, of course, in order to show that they were authorized to make such statement.

Mr. BARRET.—So I understand that counsel's case and there will not be an attempt to connect it up?

The COURT.—I don't know anything about that.

Mr. BARRETT.—Then we object to it unless there is a promise from counsel to connect it up.

The COURT.—It is not objectionable as to the defendant it affects.

Mr. BLAKE.—I suppose it will all have to go in to be limited by a proper instruction by your Honor. I suppose that is the way out of the dilemma.

The COURT.—Yes.

Mr. BARRETT.—We object to your reading it to the jury at this time, or to its being admitted in

evidence, those parts of that article which purport to be a statement by this newspaper of what part the [237] defendant Hearst would have or was going to have or had in the issue in which the alleged libel here involved is contained. We object to that being read to the jury or being read in evidence for any purpose.

THE COURT.—The objection is overruled. The article upon counsel's own statement is entirely admissible as to one of the defendants. The other is to be governed by an instruction, which the jury may understand now, that the statements therein, unless there is something to show that Mr. Hearst is connected with this fellow-defendant in some manner, the jury will confine its consideration of this article to the other defendant."

Counsel for the defendants excepted to said ruling which exception the defendants hereby designate as their

Exception No. 37.

Thereupon the following occurred:

"MR. BARRETT.—We also object especially on the part of the defendant William Randolph Hearst on the same grounds, immaterial, irrelevant and incompetent.

THE COURT.—That is the one that your objection was just interposed in behalf of.

MR. BARRETT.—I want a special objection in behalf of that defendant, your Honor.

THE COURT.—The same ruling."

Counsel for the defendant William Randolph Hearst excepted to said ruling on behalf of said de-

fendant, which said ruling the defendants hereby designate as their

Exception No. 38.

Said article is as follows:

[Extract from San Francisco "Examiner" of November 30, 1913.]

"'EXAMINER" TO PUBLISH WATER BILL EDITION IN WASHINGTON.

Hetch Hetchy Measure to Have Support of Special Issue Printed and Circulated Tomorrow Throughout the East.

Stupendous Task is Result of Idea Conceived by W. R. Hearst and Carried Out by Him and Able Staff to Lieutenants. [238]

Petition, With 20,000 Names, to Help Back Up Great Fight Against Conspirators Who Are Striving to Defeat the Measure.

Under the personal supervision of Mr. William R. Hearst a special sixteen-page edition of the San Francisco 'Examiner' will be printed and published in Washington tomorrow.

The object of this special edition is to bring forcibly to the attention of the Senate of the United States and to the people of the East the strongest and most conclusive arguments in favor of the passage of the Hetch Hetchy bill.

In this special edition, under which Mr. Hearst and a large staff, scattered throughout the entire country, have been working for weeks, will be concentrated and effectively presented the strongest public opinion in sympathy with San Francisco's twelve-year-long fight for an adequate water supply.

UNIQUE IN ITS LINE.

This newspaper will not only comprise the most striking and complete exposition of San Francisco's argument for the grant of the Hetch Hetchy reservoir ever presented; it will be also largest and most finished issue of a newspaper ever published for any reason so far distant from its home office.

Its publication will constitute an enterprise unique in the history of newspaper work not only in the high, unselfish purpose to which it is dedicated, but in the energy, cost and labor which have gone into its making.

This special Hetch Hetchy edition of the 'Examiner' will be printed to-night in the offices of the Washington 'Post' after having been carefully prepared by a staff of writers and editors taken to Washington from San Francisco and New York. It will be published to-morrow morning with the other Washington newspapers and circulated throughout all of Washington and its territory and throughout all the Eastern States.

The circulation of this special edition will be enormous, greater for the day than that of any other Washington paper.

COPY FOR EACH SENATOR.

Copies of it will be on the breakfast table of every one of the eighty Senators who will have the task of voting on the Hetch Hetchy bill. It is to them that the issue has been specially directed.

Thousands of copies will be circulated in every quarter where the specious arguments of the opponents of the Hetch Hetchy bill have made impression.

One of the principal endeavors made is to refute and shatter the arguments brought against the reservoir site under the disguise of nature worship. [239]

With this special edition of the 'Examiner,' summing up with compelling force San Francisco's entire case in the Hetch Hetchy fight and with the 'Examiner' petition, bearing the signatures of twenty thousand important citizens of California, brought to bear upon the Senate at the psychological moment of its meeting to take up the bill, every one of those men who have been conducting the reservoir battle for this city will enter the lists with the Senate to-morrow confident that victory will be assured.

IDEA BORN BUT RECENTLY.

This special Hetch Hetchy edition of the 'Examiner' to be published at the doors of the Senate tomorrow, and 'The Examiner' petition with which it will be buttressed, were conceived by Mr. Hearst less than two weeks ago. At that time it first become apparent that by a costly and widespread publicity campaign the opponents of the Hetch Hetchy had made such inroads upon opinion in the East and Middle West that the bill, upon which so much depends for San Francisco, was in serious danger.

For many years this newspaper has unceasingly and strenuosuly advocated the Hetch Hetchy project, and Mr. Hearst, through his other newspapers and his own influence, has lent every possible assistance. When it became apparent how desperately the bill's opponents were fighting in these last

months to secure votes in the Senate Mr. Hearst decided that something more effective than had yet been done must be done, and done before the Senate got down to actual consideration of the bill.

PLANS GRATEFULLY ACCEPTED.

He suggested this special edition of the 'Examiner' in Washington and a petition from the people direct to the Senate. Both of these suggestions were gratefully and enthusiastically accepted by Mayor Rolph and his lieutenants in the fight who pledged and gave every aid.

The brief and brilliant history of the 'Examiner' petition to which, in less than five days, twenty thousand citizens subscribed their names, is already known.

HEARST GOES TO WASHINGTON.

As soon as the special Hetch Hetchy edition was decided upon Mr. Edward H. Hamilton of the 'Examiner' staff was rushed to Washington with a corps of assistants. The staff of the Heart News Bureau in Washington was placed at Mr. Hamilton's disposal. Several days ago Mr. William R. Hearst went to Washington, taking with him a complete editorial force from New York. Mr. Hearst personally assumed the task of supervising the work of preparing the edition.

The entire news-gathering machinery of the 'Examiner' was utilized under high pressure in the collection of material. **[240]**

EDITION FULLY ILLUSTRATED.

It was necesasry that the edition should be fully illustrated with photographs, maps, diagrams and

statistics. These were made here and expressed to Washington.

The task remained to give expression to favorable opinion throughout the country which had not yet been secured. From this office telegrams and letters explaining San Francisco's position in the Hetch Hetchy fight and combatting the arguments used by opponents of the bill were sent to every influential private and public individual and organization.

The arguments brought to bear by 'The Examiner' elicited from the *Governor* of six important Western States enthusiastic statements advocating the passage of the Hetch Hetchy bill. The opinions of these Governors are bound to have a powerful effect.

SUPPORTING OPINION FOUND.

Civic, social, political and labor organizations throughout all the metropolitan area of San Francisco and throughout California, and in every large community between the Atlantic and the Pacific were besought by the 'Examiner' to come to the aid of San Francisco in this great emergency. The arguments brought to bear resulted in directing upon the headquarters of the special edition in Washington a flood of supporting opinion that otherwise never would have been heard from.

The aid and backing of women all over the State of California and of important women in the public eye all over the country—women like Jane Addams and Mrs. John A. Logan—was sought by a bombardment of appeal directed from the offices of this news-

paper and the Hearst papers in Los Angeles, Chicago, New York and Atlanta.

In this way a torrent of favorable public opinion was directed into the office of the 'Examiner,' where it was rearranged, tabulated and prepared for publication and transmitted to the headquarters of the special edition in Washington.

TO OFFSET NATURE LOVERS.

By far the most decided opposition to the bill has been done by people and interests cloaked as 'nature lovers.' To counteract and offset the malicious and ill-founded arguments of these bogus 'nature lovers,' *bona fide* lovers of nature all over California and elsewhere were appealed to for support. From scores of members of the Sierra Club, the stationery and name of which has been utilized by alien and selfish interests to befog the issue at stake, powerful statements were secured denouncing the action of a section of the club and shattering the theory that the formation of a beautiful lake in the Hetch Hetchy valley would do aught but enhance its beauty.

The argument upon which Senator Works has been [241] basing his opposition to the bill had also to be met and destroyed. The latest theory of that senator that the bill did not properly defend the interests of Oakland and the bay cities were conclusively contradicted by officials' statements given to the 'Examiner' for this special edition by all the mayors and officials of these cities and by private citizens.

And all of this matter, making a powerful and most effective brief, comprehensive enough to fill

sixteen pages of this newspaper, will be in the hands of every Senator when he enters the Senate chamber to-day to decide the fate of San Francisco in a matter upon which almost its very existence depends."

Thereupon counsel for the plaintiff offered and read in evidence the deposition of Hon. Thomas R. Marshall, Vice-President of the United States of America, theretofore taken on behalf of the plaintiff, in Washington, D. C., on January 20th, 1915. In the course of said deposition the following proceedings occurred:

The witness having stated that he had written an article which appeared in the Washington edition of the San Francisco "Examiner," published in Washington, D. C., on December 2d, 1913, was interrogated with respect to his knowledge of any members of the staff of the newspapers of William Randolph Hearst, and further, in respect to the circumstances under which he had given out such statement for publication. In this behalf the witness testified as follows:

"I am not acquainted with the newspaper staff of the papers owned by Mr. William Randolph Hearst. I may know some of the members of the staff, but as to their being connected with his papers I know no one definitely to be so connected save and except that I have been informed and believe that in some way Mr. John Temple Graves is connected with the news enterprises of Mr. Hearst. Human memory is at the best uncertain. My recollection is that I had a talk with Mr. John Temple Graves, and as I observe by the next question that I am called

upon to state fully the facts and circumstances under which I signed the statement, I reserve the right to answer under that inquiry."

The next inquiry propounded to the witness had to do [242] with the facts and circumstances under which he gave a statement which appeared in the Washington edition of the San Francisco "Examiner" of December 2d, 1913. In response to such inquiry the witness first stated that when the matter was first called to his attention he had informed Honorable Key Pitman, Chairman of the Public Lands Committee of the United States Senate, that he was opposed to the Hetch Hetchy bill upon the ground that the bill if passed would destroy a great beauty spot of nature. The witness then testified that subsequently he had learned that Hetch Hetchy Valley was not a great beauty spot; that he had learned this fact in Arizona and through letters of Mr. John Muir. The witness then continued:

"Thereupon, one day Mr. John Temple Graves, as I remember it, asked me whether I was opposed to the Hetch Hetchy bill. I said to him that I had changed my mind and if it came up to me I would vote for the proposition. He then asked me in substance whether I had any objection to so stating in writing, and I said I had not. I wrote the article, as I remember, and handed it to him. I did not request its publication and did not know it was going to be published, but I did not have the slightest objection to anybody on earth knowing that I had changed my mind and had withdrawn from the original statement that I had made, that if there was a

tie vote I would vote upon the Hetch Hetchy proposition.''

Thereupon, the following occurred:

''Mr. BARRETT.—We move to strike out the part of the testimony of this witness relating to a conversation and the contents of a conversation that he had with a man named John Temple Graves, on the ground that it is hearsay.

The COURT.—I will deny the motion.''

Counsel for defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 39.

Thereupon, the following proceedings occurred:

Mr. BLAKE.—I offer in evidence an article in **[243]** the San Francisco 'Examiner' of December 1st, 1913, a newspaper dispatch, under the headline 'Marshall For Hetch Hetchy; Vice-president Will Cast Vote For Water Bill if Necessary; Gives Views to the ''Examiner''; Writes for Special Edition that is to be printed in Washington.'

Mr. BARETT.—I object to that as immaterial, irrelevant and incompetent, sufficient foundation not laid, and it is hearsay. I make the objection in behalf of both defendants and for the defendant Hearst separately.

The COURT.—Now, this appears in the publication of the defendant, the Examiner Printing Company, does it?

Mr. BLAKE.—Yes, sir.''

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which excep-

tion the defendants hereby designate as their

Exception No. 40.

Said article is as follows:

[Extract from San Francisco "Examiner," December 1, 1913.]

"MARSHALL FOR HETCH HETCHY.
Vice-president Will Cast Vote for
Water Bill if Necessary.
GIVES VIEWS TO 'EXAMINER.'
Writes for Special Edition That is
to be Printed in Washington.
(Special by leased wire, the longest
in the world.)

WASHINGTON, November 30.—Reports that Vice-president Marshall was opposed to the Hetch Hetchy bill were cleared up to-day when he furnished a signed statement of his attitude for the special Hetch Hetchy edition of the San Francisco 'Examiner' to be printed in Washington on the eve of the Senate battle on the bill.

The Vice-president states that he had been opposed to the bill on sentiment before he learned the fact, but that after investigation he is for the measure, and will vote for it if his vote is needed. Following is his statement:

The Vice-president's Chamber,
Washington, D. C. [244]

It has been declared improper for the presiding officer of the Senate to express an opinion upon pending legislation, although why this is so, in view of his right to cast a deciding vote, I cannot see.

Without knowledge of the Hetch Hetchy project,

and moved solely by sentiment unbased on knowledge of its merits, I recently said that if it came to me I would vote against it. Since then I have examined the bill and the facts as found upon which it is based. I now believe the measure meritorious, and if it needs my vote, it will be so recorded.

THOMAS R. MARSHALL.

The Vice-president thus joins the long list of administration officials who are giving the Hetch Hetchy bill their hearty support."

Thereupon the following occurred:

"Mr. BLAKE.—Now, there is a dash underneath that which indicates that it is the end of the Washington dispatch, and then follows what might be called editorial comment.

Mr. BARRETT.—We make the same objection to that your Honor.

The COURT.—The same ruling."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 41.

The matter referred to was thereupon received in evidence, and is as follows:

"WILL COME WITH REPORT.

San Francisco's sentiments with regard to the Hetch Hetchy water problem solution and the necessity of it for this city will be brought to the direct attention of the legislature in Washington and the people of the Eastern States on Tuesday or Wednesday morning by a special sixteen-page Hetch Hetchy edition of 'The San Francisco Examiner'

printed in Washington. It had first been planned to issue this special edition this morning, but it has been thought best to make it coincident with the report of the Senate committee.

On the breakfast table of each member of this committee, as well as on those of hundreds of thousands of friends and foes alike of Hetch Hetchy, the paper will appear with its direct, convincing plea for fair play for San Francisco.

PREPARED BY EXPERT WRITERS.

This edition of the paper, far and away the [245] most elaborate of its kind ever attempted, is being prepared by a corps of expert writers and newspaper office men from the Hearst papers under the direct supervision of Mr. William Randolph Hearst.

It will contain the history and necessity of Hetch Hetchy for San Francsico's use, incontrovertible arguments in favor of the passage of the bill which will give this city its sorely needed water supply."

Thereupon the following occurred:

"Mr. BLAKE.—I desire to introduce in evidence as part of the proof of the inducement pleaded in our complaint a copy of the 'Arizona Gazette' of July 7, 1913, containing a Washington dispatch under the heading 'Hetch Hetchy Chicanery,' as going to show the wide-spread newspaper notoriety, as pleaded in the complaint of the facts of the suppression of this report as outlined and stated by Eugene J. Sullivan.

Mr. BARRETT.—That is objected to as immaterial, irrelevant, incompetent and hearsay.

The COURT.—The objection is overruled."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 42.

Said article was thereupon received in evidence, marked "Plaintiff's Exhibit 39," and is as follows:

[Plaintiff's Exhibit No. 39—Extract from "Arizona Gazette" of July 7, 1913.]

"HETCH HETCHY CHICANERY.

Eugene J. Sullivan of San Francisco, President of the Sierra Blue Lakes Water & Power Company, before the House Public Lands Committee to-day made charges of chicanery, suppression of report and political bias of the engineers in the interest of the Hetch Hetchy project for supplying San Francisco with water."

"Mr. BLAKE.—On identically the same subject matter I offer in evidence, as being contained in the 'Evening World Herald,' of Omaha, Nebraska, under date of July 7, 1913, under the heading: 'Alleges Crookedness in Hetch Hetchy Plan,' the following: **[246]**

Mr. BARRETT.—The same objection, your Honor.

The COURT.—The same ruling."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 43.

Said article was thereupon received in evidence, marked "Plaintiff's Exhibit 40," and is as follows:

[Plaintiff's Exhibit No. 40—Extract from "Evening World Herald" of July 7, 1913.]

"ALLEGES CROOKEDNESS IN HETCH HETCHY PLAN.

Eugene J. Sullivan of San Francisco, president of the Sierra Blue Lakes Water & Power Company, before the house public lands committee to-day made the charges of 'chicanery,' suppression of a report and political bias of engineers in the interest of the Hetch Hetchy project for supplying San Francisco with water."

"The COURT.—This is all in support of the matter of inducement, is it?

Mr. BLAKE.—Yes, sir, that this matter was widely discussed in the newspapers of the country. And on the same identical subject, we offer the matter contained in the 'Herald Republican' of Salt Lake City, Utah, under date of July 8, 1913.

Mr. BARRETT.—The same objection.

The COURT.—The same ruling."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 44.

Thereupon said article was received in evidence, marked "Plaintiff's Exhibit 41," and is as follows:

[Plaintiff's Exhibit No. 41—Extract from "Herald Republican" of July 8, 1913.]

"CHARGES CHICANERY IN HETCH HETCHY PROJECT.

Eugene J. Sullivan of San Francisco, President

of the Sierra Blue Lakes Water & Power Company, before the House public lands committee to-day, made general charges of 'chicanery,' suppression of a report and political bias of engineers in the interest of the Hetch Hetchy project for supplying San Francisco with water. Contending that there was a supply of 350,000,000 gallons daily available from the Mokelumne River, a tributary of the San Joaquin, **[247]** sufficient for San Francisco's needs for a century, Mr. Sullivan charged that a 'coterie of political engineers deceived Mayor Phelan, the army advisory board and the public lands commission,' and that C. E. Grunsky, an engineer, and former City Engineer Manson made 'false reports.' "

Thereupon plaintiff offered and there was read in evidence the deposition of Robert Underwood Johnson theretofore taken on behalf of the plaintiff in New York City, New York, on January 6, 1915. During the course of said deposition the following questions were asked and the following proceedings occurred:

[Deposition of Robert Underwood Johnson, for Plaintiff.]

The witness testified that he was the Mr. Johnson referred to in the article in the Washington edition of the San Francisco "Examiner" issued at Washington on December 2, 1913, under the headline "Reported Favorably to Senate," and particularly under the heading in black-faced type "Inspiration of Opposition," wherein it was stated Mr. Johnson "got very angry when Sullivan was referred to as

(Deposition of Robert Underwood Johnson.)

his friend, although he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man Aston."

The witness further testified that he had appeared before the Committee on Public Lands of the United States Senate, during the first session of the Sixty-third Congress, while House-Bill No. 7207 was under consideration, and had there stated that Mr. Taggart Aston of San Francisco, the plaintiff in the action, was his authority for certain statements made to said Committee.

Thereupon the following question was asked:

"Q. 8. You will please state whether or not on the occasion hereinbefore referred to before the Committee on Public Lands in the United States Senate, you spoke of Mr. Aston as 'Sullivan's man Aston', or whether or not you spoke of Mr. Aston in connection with any Mr. Sullivan upon that occassion. [248]

MR. BARRETT.—Objected to as immaterial, irrelevant and incompetent and without foundation in the record. It is only claimed with reference to this witness that certain things happened in connection with Mr. Sullivan. Is that not true?

MR. BLAKE.—The Court is carrying in mind at all times the libelous article.

THE COURT.—I think within the lines of my ruling the other day, growing out of the peculiar nature of this alleged libelous article which couples the name of the plaintiff here with Sullivan, that this question is competent."

(Deposition of Robert Underwood Johnson.)

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 45.

To said question the witness answered:

"I never spoke of Mr. Aston as 'Sullivan's man Aston' nor in connection with Sullivan except as appears in the foregoing statement, Mr. Sullivan being under consideration by the Committee."

The "foregoing statement" referred to by the witness, is a statement given in answer to Interrogatory No. 2 in which the witness testified that he had stated to the Committee on Public Lands of the United States Senate, that Sullivan was not his friend and that his mention of the Mokelumne region as adequate source of supply for San Francisco's water was based on information from Taggart Aston, this information having been received from Mr. Aston's published letter to Mr. Ferris, Chairman of the House Committee on Public Lands.

Thereupon, the following question was asked of the witness by counsel for the plaintiff; "the occasion" referred to in the question being the meeting of the Public Lands Committee of the United States Senate, previously referred to.

"Q. 9. Also please state if upon the occassion last referred to, you characterized any thing or matter, on the authority of Mr. Aston, as 'a bad jobbery.' [249]

MR. BARRETT.—The same objection.

THE COURT.—Is there any charge here that he

(Deposition of Robert Underwood Johnson.)

characterized it as a bad job?

MR. BARRETT.—No, your Honor.

MR. BLAKE.—Only in the libelous matter, 'but at the house hearing it had been so thoroughly developed that Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend though he admitted receiving the information on which he attacked the Hetch Hetchy project as 'bad jobbery' from 'Sullivan's man Aston.' They say Johnson characterized it as 'bad jobbery'."

The Court overruled said objection. Counsel for the defendant excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 46.

To said question the witness answered: "I never did."

Thereupon the following proceedings occurred:

MR. BLAKE.—If the Court please, there is one piece of documentary evidence I have here that I would like to make an offer of at this time with the consent of counsel. It may have some bearing on what I shall desire to do in calling other witnesses to prove the direct connection between the defendant Hearst and this publication. I have here certified copies of the certificates which are filed with the postoffice authorities under a provision of an act of Congress of August 24, 1912, passed by the United States for the purpose of determining the proprietorship and ownership of newspaper enterprises, newspaper stocks and bonds. These affidavits, which are filed and become a part of the public

documents of the department of the postoffice, contain the names of the president and secretary, and the editors and managers of newspaper publications, the owners of stock holding one per cent or more of the total amount of stock, if it be a corporation, and the known bondholders, mortgagees or other securities holding more than one per cent of the total amount of bonds, mortgages and other securities. I make an offer of these certified copies of public documents to prove the connection of the defendant William Randolph Hearst with the following-named papers: The San Francisco 'Examiner' of San Francisco, California; the Los Angeles [250] 'Examiner' of Los Angeles California; the Atlanta 'Georgian' of Atlanta, Georgia; the Chicago Evening 'American' of Chicago, Illinois; the Boston 'American' of Boston, Mass., and the New York Evening 'Journal' of New York, N. Y.

MR. BARRETT.—I object to that as irrelevant, immaterial and incompetent."

The Court overruled said objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 47.

The document was thereupon received in evidence, marked "Plaintiff's Exhibit 44," and is as follows:

[Plaintiff's Exhibit No. 44—Certified Copies of Statements of Ownership, etc.]

"POSTOFFICE DEPARTMENT,
Washington.

December 26, 1914.

I, A. S. BURLESON, Postmaster General of the United States of America, certify that the annexed are true copies of the original statements on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[Seal] A. S. BURLESON,
Postmaster General.

J. M.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF AUGUST, 24, 1912, of THE SAN FRANCISCO "EXAMINER," published daily, including Sunday, at San Francisco, California, for October 1, 1914.

Name Of.	Postoffice Address.
President, Dent H. Robert,	1899 California St., San Francisco.
Secretary and Treasurer, W. F. Bogart,	16 Fifth Avenue, San Francisco.

[251]

Name Of.	Postoffice Address.
Managing Editor, C. S. Stanton,	2255 Vallejo Street, San Francisco.
Business Managers, C. S. Young,	2822 Clay Street, San Francisco.
Publisher, Examiner Printing Company,	San Francisco, Cal.

Owners: (If a corporation, give its name and the names and addresses of stockholders holding 1 per cent or more of total amount of stock. If not a corporation, give names and addresses of individual owners.)

William R. Hearst, New York City.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities: (If there are none, so state.)

None.

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date shown above. (This information is required from daily newspapers only.)

136,839.

DENT H. ROBERT.

(Signature of editor, publisher, business manager, or owner.)

Sworn to and subscribed before me this First day of October, 1914.

A. J. Henry,
Notary Public, (Seal.)
City & County San Francisco, Cal.

A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

(My commission expires Sept. 25, 1915.)

Note:—This statement must be made in duplicate and both copies delivered by the publisher to the postmaster, who shall send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice. The publisher must publish a copy of this statement in the second issue printed next after its filing.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., of the Los Angeles "Examiner," published daily and Sunday at Los Angeles, California, required by the Act of August 24, 1912.

Note:—This statement is to be made in duplicate, both copies to be delivered by the publisher to the postmaster, who will send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice.

Name Of.	Postoffice Address.
Editor, M. F. Ihmsen,	Los, Angeles, California.

[252]

Managing Editor, F. W. Eldridge,	Los Angeles, California.
Business Manager, M. F. Ihmsen,	Los Angeles, California.
Publisher, Los Angeles Examiner, a corporation,	Los Angeles, California.

Owners: (If a corporation, give names and addresses of stockholders holding 1 per cent or more of total amount of stock.)

None other than William Randolph Hearst, New York City.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities;

None.

Note:—As the average circulation for six months ending September 30th, 1914, was 77,475 copies and the average circulation for six months ending September 30th, 1913, was 75,161 copies, there is shown a gain of 2,314 copies.

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date of this statement. (This information is required from daily newspapers only.)

77,475.

Average Sunday circulation for 6 months ending September 30, 1914:

146,969.

M. F. IHMSEN.

Sworn to and subscribed before me this 7th day of October, 1914.

H. O. Hunter,
Notary Public, (Seal.)
Los Angeles Co., Cal.

H. O. HUNTER,

Notary Public in and for the County of Los Angeles, State of California.

(My commission expires May 18, 1918.)

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., of the Atlanta "Georgian," published daily at Atlanta, Ga., required by the Act of August 24, 1912.

[253]

Note:—This statement is to be made in duplicate, both copies to be delivered by the publisher to the postmaster, who will send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice.

Name Of.	Postoffice Address.
Editor, ...,	.....
Managing Editor, Keats Speed,	Atlanta, Ga.
Business Manager, Hugh E. Murray,	Atlanta, Ga.
Publisher, The Georgian Company,	Atlanta, Ga.

Owners: (If a corporation, give names and addresses of stockholders holding 1 per cent or more of total amount of stock.)

The Georgian Company,	Atlanta, Ga.
W. R. Hearst, 137 Riverside Drive,	New York City.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities:

W. R. Hearst, 137 Riverside Drive,	New York City.
Trust Company of Georgia, Trustee,	Atlanta, Ga.

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date of this statement. (This information is required from daily newspapers only.) 51,914

Distributed to agents, hotels, files, samples, employees, etc. 3,215

55,129

FOSTER COATES,
President.

Sworn to and subscribed before me this third day of October, 1914.

H. C. Crosthwait,
Notary Public, (Seal.)
Fulton County Ga.

H. C. CROSTHWAIT,
Notary Public.

My commission expires March, 1915. [254]

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, etc., REQUIRED BY THE ACT OF AUGUST 24, 1912, of Chicago "Evening American," published daily except Sunday at Chicago, Illinois, for October 1st, 1914.

Name Of.	Postoffice Address.
Editor, W. A. Curley,	5431 Cornell Ave., Chicago, Ill.
Managing Editor, W. A. Curley,	5431 Cornell Ave., Chicago, Ill.
Business Manager, F. M. Lambin,	2518 No. Spaulding Ave., Chicago.
Publisher, Harrison M. Parker,	455 Deming Place, Chicago.

Owners: (If a corporation, give its name and the names and addresses of stockholders holding 1 per cent or more of total stock. If not a corporation, give names and addresses of individual owners.)

Evening American Publishing Company,	
William Randolph Hearst,	New York, New York.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities: (If there are none, so state.)

None.

Average number of copies ofeach issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six

months preceding the date shown above. (This information is required from daily newspapers only.)

363,071.

Guy A. Smith, Notarial Seal. Cook County, Ill. (Seal) HARRISON M. PARKER, President.

Sworn to and subscribed before me this first day of October, 1914.

GUY A. SMITH,

My commission expires April 6, 1918.

Note:—This statement must be made in duplicate and both copies delivered by the publisher to the postmaster, who shall send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice. The publisher must publish a copy of this statement in the second issue printed next after its filing. [255]

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., of the Boston "American," published daily and Sunday at Boston, Mass., required by the Act of August 24, 1912.

Note:—This statement is to be made in duplicate, both copies to be delivered by the publisher to the postmaster, who will send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice.

Name Of.	Postoffice Address.
Editor, Arthur L. Clarke,	80 Summer St., Boston.
Managing Editor, James W. Reardon,	80 Summer St., Boston.
Business Managers, ...	.....
Publisher, New England Newspaper Publishing Co.,	80 Summer St., Boston.

Owners: (If a corporation, give names and addresses of stockholders holding 1 per cent or more of total amount of stock.)

William Randolph Hearst, New York City, N. Y.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securieies:

None.

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise to paid subscribers during the six months preceding the date of this statement. (This information is required from daily newspapers only.)

Daily average 394,893
Sunday average 341,183
Combined average .....387,014.

NEW ENGLAND NEWSPAPER PUBLISHING CO.

By WM. HOLMES, Treas.

Sworn to and subscriber before me this second day of October, 1914.

Junius T. Auerbach, Notary Public, (Seal) Massachusetts.

JUNIUS T. AUERBACH,
Notary Public.

My commission expires Dec. 18th, 1915. [256]

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF AUGUST 24, 1912, of New York "Evening Journal," published daily except Sunday at New York, N. Y., for Oct. 1, 1914.

Name Of.	Postoffice Address.
Editor, Arthur Brisbane,	238 William Street New York City.
Managing Editor, Caleb M. Van Hamm,	238 William Street New York City.
Business Manager, James C. Dayton,	238 William Street New York City.
Publisher, Star Company,	238 William Street New York City.

OWNERS: (If a corporation, give its name and the names and addresses of stockholders holding 1 per cent or more of total amount of stock. If not a corporation, give names and addresses of individual owners.)

Star Company,	238 William Street New York City.
Stockholder—The Star Company,	15 Exchange Place, Jersey City, N. J.

Stockholder in The Star Company.

W. R. Hearst, 238 William Street, New York City.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities: (If there are none, so state).

Columbia-Knickerbocker-Trust Company,	60 Broadway, New York City.

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the data shown above. (This information is required from daily newspapers only.)

797,477.

JAMES C. DAYTON.

Sworn to and described before me this first day of October, 1914.

L. M. Powers,
Notary Public, (Seal)
New York County.

L. M. POWERS,
Notary Public No. 6 N. Y. Co.

My commission expires March, 1916.

Note:—This statement must be made in duplicate and both copies delivered by the publisher to the postmaster, who shall send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the postoffice. The publisher must publish a copy of this statement in the second issue printed next after its filing. [257]

[Endorsed]: "No. 15,780, N. S. Dist. Court, Nor. Dist. of Cala. Pltff's. Exhibit 44. (A) Clerk."

The following extracts from Postal Laws and Regulations appeared upon the back of each of the foregoing certificates:

"Sec. 443. It shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the

first day of October of each year, on blanks furnished by the Postoffice Department, a sworn statement setting forth the names and postoffice addresses of the editor and managing editor, publisher, business managers, and owners, and in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph with in ten days after notice by registered letter of such failure. (Act of August 24, 1912.)

2. All editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other read-

ing matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500). (Act of August 24, 1912.)

3. The statement required by this section shall be made in duplicate, on Form 3526, and both copies delivered to the postmaster at the office of entry of the publication. The postmaster shall forward one copy to the Third Assistant Postmaster General (Division of Classification), and retain the other in the files of the postoffice. To enable publishers to file such statement promptly, postmasters shall furnish them copies of Form 3526 at least ten days prior to the first day of April and of October of each year. [258]

4. Postmasters shall obtain for the files of their offices a copy of the issue of each publication at their respective offices, in which the required sworn statement is published.

5. Postmasters shall give prompt and careful attention to the making and filing by publishers of the statements required by this section, and promptly report to the Third Assistant Postmaster General the failure of any publisher to file such statement, or to publish it in the second issue of the publication printed next after it has been filed, but in no case shall a publication be denied the priveleges of the mail except upon departmental instructions.

6. Where exemption is claimed from compliance with the provisions of this section, the postmaster

shall request from the publisher a statement showing the ground on which such exemption is claimed and forward it to the Third Assistant Postmaster General, Division of Classification, together with a copy of the publication.

Sec. 428. Whoever shall knowingly submit or cause to be submitted to any prostmaster or to the Post Office Department or any officer of the postal service, any false evidence relative to any publication for the purpose of securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined not more than five hundred dollars. (Act of March 4, 1909.)" [259]

[Testimony of C. E. Grunsky, for Defendants.]

C. E. GRUNSKY, a witness on behalf of the defendants, testified that he was a civil engineer who had practiced his profession since 1878; that during the years 1912 and 1913 he was asked by the Board of Supervisors to take charge of work that had been in progress in the city engineer's office by Mr. Manson, who was then city engineer, and who by reason of illness was for a time incapacitated; that in connection with this work he was asked by Mr. Freeman, who had been called in to take charge of the Water Supply Investigation of San Francisco, to make a number of studies relating to quite a number of sources of supply, Eel River, Feather River, Yuba River, Stanislaus River, Mokelumne and others, as various possible sources of water, indicated by the Board of Army Engineers to the City as desirable of investigation; that he made use of the information that was in the city engineer's office, put a

(Testimony of C. E. Grunsky.)

number of assistants at work and gathered the information together, formulated reports upon these various sources of supply and finally submitted them to the Army Engineers; that his investigation included what is known as the Mokelumne river and the properties of the Sierra Power & Water Company.

The witness further testified that he made a special report on the Mokelumne River source of water supply, which report was transmitted under date of July 25, 1912, to Percy V. Long, the City Attorney of San Francisco, and which was delivered by the latter to the Board of Army Engineers in connection with their investigation on August 1, 1912.

The witness further testified that during the preparation of his report he had access to the so-called Bartell report and made use of it in getting up his report on the Mokelumne river source of supply; that it was referred to in his **[260]** report, and certain maps and diagrams contained in the Bartell report were incorporated in his report as made to the advisory board through the city attorney; that these diagrams, among others, contained one that shows the discharge of the Mokelumne river at critical periods, and that that diagram, which showed the flow of the river, the storage in the available reservoir sites and water production, was in substance the essential part of the Bartell report, and gave the conclusions which he reached, and show the location of the reservoirs by name and their capacities, the probable cost of constructing

(Testimony of C. E. Grunsky.)
dams, and other like information.

The witness further testified that there were several references in his report to the Bartell report, among others, the following on page 94 of the witness' report:

> "There are also submitted with this report a number of diagrams prepared by Mr. M. J. Bartell, and submitted to the city engineer under date of April 24, 1912."

The date mentioned being the date of the Bartell-Manson report.

Thereupon the following proceedings were had:

"Q. Is there another reference on page 58 of your book? A. There is.

Q. What is that? A. It is: 'The normal or mean annual precipitation on this area mostly in the form of snow is 52 inches; see Rainfall Map, Sheet 10, prepared by Mr. M. J. Bartell under the directions of Mr. Marsden Manson, city engineer, and the run-off in a year of normal rainfall is about 19 inches, or 66,000 acre feet.'

Q. Is there another reference on page 62 of your report, to the Bartell report? A. There is another reference on page 62 which reads as follows, referring to a curve showing the relation between rainfall and the amount of water running off the ground. Referring to this curve, this report states:

'The differences, also, particularly for small amounts of rain, from the curves constructed by Mr. M. J. Bartell under the direction of Mr. Marsden Manson, city engineer.'

(Testimony of C. E. Grunsky.)

I should have stated that on page 94 the quotation as I gave it a moment ago was not completed, because **[261]** the reference is then to four diagrams, sheet No. 9, Map of Mokelumne River Watershed, showing lands in private ownership (Bartell). Sheet No. 10, Map showing Isohyets and drainage areas; Bartell. Sheet No. 11, Mass Diagrams of the flow of Mokelumne River at Electra; Bartell. Sheet No. 14, Run-off curve; Bartell.

The COURT.—None of those references speak of it as a completed report? A. No, they simply refer to the fact that that data was in the office and had been prepared by Mr. Bartell for the city engineer, and was made use of by me in the preparation of my report.

Mr. BARRETT.—Q. What is the legend on that map? A. This is marked 'Sheet No. 11.' The title is 'Board of Public Works, San Francisco, California. 'Mass Diagram of the Water Available at Electra after allowing for Woodbridge Canal Rights, drainage of Mokelumne River, tributary to Electra, 537 square miles; prepared under the direction of Marsden Manson, city engineer, by M. J. Bartell; March, 1912.' . . .

Q. Where was it taken from?

A. This was obtained at the city engineer's office, probably in conference with Mr. Bartell, himself, with whom I advised in connection with these matters at the time that I was working on this system.

Q. I understood you to say that at the same time you were conversant with the Bartell report as filed

(Testimony of C. E. Grunsky.)

by Mr. Bartell, were you? A. I was.

Q. And had access to that?

A. I did have access to it.

Q. And based your report on it, so far as your engineering interpretation of the Bartell report was concerned?

A. I based such information that I took from the Bartell report on these diagrams and from the typewritten report itself. I had a copy of that report in my possesion. . . .

Q. Now, will you say that all of the engineering significance of the Bartell report was incorporated by you in yours?

A. It was, in the form of this diagram that I have referred to. . . .

Q. Will you kindly look at the Bartell report and see what map or sheet you have reference to there, referring to Plaintiff's Exhibit 22?

A. The sheet that I referred to as sheet No. 11 in my report appears as sheet No. 3 in the Bartell report. . . .

Q. I will ask you what in your judgment was the significance of the Bartell report? . . .

The COURT.—They are simply asking his opinion as to the engineering significance and the value of the Bartell report.

A. The Bartell report enumerated a number of available reservoir sites in the watershed of the Mokelumne River. It enumerated a number of established rights to the water of the Mokelumne River. On the basis of that information and a study of

(Testimony of C. E. Grunsky.)

the flow of the Mokelumne River largely based upon rainfall studies and an assumed amount of runoff bearing relation to the rainfall, Mr. Bartell determined that the [262] water production of the river, that is to say, a uniform output of the river, could be maintained throughout two critical periods; one period was from 1897 to 1899 and the other was from 1907 to 1909. This study made by Mr. Bartell was based on a definite assumption with reference to the amount of water that could be held back in reservoirs to equalize the flow of the river. It was made in the way in which the engineer makes his studies in order to determine the availability as a source of water for municipal supply where it is necessary that the quantity of water shall be available at all times. The report is valuable in showing a definite conclusion relating to what the result will be if the amount of storage that Mr. Bartell assumed is actually made available and in effective localities. That information is on the diagram and to that extent the report is valuable to the engineer making a study of the availability of the Mokelumne River. The report does not purport to be and is not an analysis of the ultimate water production of the Mokelumne River. Mokelumne River affords a great deal more water. The mean annual flow of the Mokelumne River is from 800,000 to 1,000,000 acre feet in a year, and if reservoirs could be made large enough to equalize the flow of the river, the river would produce very much more water than has been set forth by the

(Testimony of C. E. Grunsky.)

Bartell report. The Bartell report is therefore simply a study that is of use and valuable to the engineer analyzing the situation.

Q. And who was the engineer analyzing the situation for the Board of Army Engineers?

A. Mr. Wadsworth.

Q. And you on behalf of the city?

A. I on behalf of the city at that time.

Q. Did you have other engineers' reports from which you made up your book besides Mr. Bartell's?

A. I did most of the work on the Mokelumne River myself in person. There were others that worked for me, but I did the principal work myself.

Q. Did you undertake to just report to the army board *verbatim* what other men had reported to you, or did you undertake to get up for the city a report of your own based upon what you investigated, and what others reported to you?

A. I undertook to make a report of my own, using the information that was available from all sources; I should say that in the report I submitted to the army engineers there is incorporated an earlier report which has been referred to in this case as the Manson report of 6 years ago, or rather, of six years earlier, but which is, in fact, a report of the city engineer, Mr. Woodward. He was then city engineer. Associated with him in making the report were Mr. Manson and Mr. J. R. Price. It has been known as the Manson report, because Mr. Manson was the engineer most familiar with the situation, and who undoubtedly did most of the work con-

(Testimony of C. E. Grunsky.)

tained in that report. As that report contains some valuable information, it was incorporated [263] in my report and transmitted with mine to the army engineers.

Q. Why was not the Bartell report included in your report to the engineers?

A. Because the Bartell report was a study of the situation by a subordinate in the office for his superior officer. It was not a finished report in any sense of the word.

The COURT.—Q. The six years earlier report by Mr. Manson was simply by an assistant; he was not the engineer in charge at the time.

A. Mr. Manson was employed as consulting engineer for the purpose of preparing this report, and ranked practically as the city engineer himself would.

Q. I thought you said Mr. Woodward was the city engineer then?

A. Mr. Woodward was the city engineer. The Board of Public Works, or the Board of Supervisors, authorized the preparation of a report by Mr. Manson and Mr. Price, who thus became associated with and ranked with Mr. Woodward, who was the city engineer. In the case of Mr. Bartell, he was an assistant in the city engineer's office, without any rank to make an independent report. It took the form of an independent report in this case. It took the form of an independent report that was submitted to the city engineer for his information. But it was simply a special study with reference to that one

(Testimony of C. E. Grunsky.)

matter, and then the cost estimate of the project itself. There was a cost estimate also in the Bartell report, but made for the information of his superior.

. . . .

Mr. BARRETT.—Q. Will you explain the engineering significance of the map which you hold in your hand? You engineers understand it; I want you to explain it so the jury can understand it.

A. This map, sheet No. 11, shows in mass diagrams or curves the flow of the Mokelumne River—

The COURT.—He has gone over this, Mr. Barret.

A. (Continuing.) for the two critical periods I have already mentioned.

Mr. BARRETT.—Q. Just exhibit to the jury.

A. There is on this sheet a table showing a certain number of reservoirs on Railroad Flat, No. 1 North Fork Reservoir, San Francisco Gas & Electric Developed Storage; San Francisco Gas & Electric Valley; the No. 2 North Fork Reservoir, which summarized show a total storage in million gallons of 80,658. This amount of storage—80,658 acre feet—when taken in connection with the mass curve which represents a summation of the flow of the river from month to month shows that the daily production from 1907 to 1909 would be 432,000,000 gallons daily on the average. A similar diagram for the period from 1897 to 1899, this diagram shows that the daily water production would be 306,000,000. This diagram further shows in a note the prior water rights in addition to the Woodbridge Canal Rights are:

(Testimony of C. E. Grunsky.)

'20 mil. gals. daily to Jackson and vicinity from Amador Canal;

'10 mil. gals. daily to Volcano Ditch; [264]

'16 mil. gals. daily to Mokelumne Hill and Campo Seco Ditch;

'10 mil. gals. daily to Crarke Ditch.

'56 mil. gals. daily.'

The COURT.—Q. Already appropriated?

A. Already appropriated; and of those amounts we subtract from the two amounts I have named, 432,000,000 gallons and 306,000,000 gallons daily it will show the net amount of water available after compensation water is deducted from those amounts. There is other information on this table relating to evaporation in Lake Eleanor, and also the cost of the dam that would be necessary to affect the storage the cost per million gallons, and then the area of the water surface, together with remarks relating to the reservoirs.''

The witness further testified that at page 147 of his report he submitted to the army engineers the proposition of the Sierra Blue Lakes Water and Power Company, which was followed by a supplemental report by C. M. Burleson, who was engineer for the company, showing cost of construction of plant, 60,000,000 gallons per day; also that he included a second and third supplementary report by Mr. Burleson.

Thereupon the following proceedings were had:

''Mr. BARRETT.—Q. Now, Mr. Grunsky, I will ask you whether or not in representing the City you

(Testimony of C. E. Grunsky.)

suppressed from the Board of Army Engineers any data obtained by you upon the question of availability as a water supply for San Francisco, of the Mokelumne source? A. No, sir, none at all.

Q. Did you misrepresent the facts as you found them? A. I did not."

The witness further testified that he was not sure whether at the time he was getting up data and reports for the Board of Army Engineers and had access to the original Bartell report he was familiar with certain pencil memoranda written thereon by Mr. Manson. The witness' attention was then called to the matter contained in the Bartell-Manson report, partly in typewriting and partly in the pencil memorandum of Mr. Manson, as follows: [265]

"The critical period, August, 1907, to December, 1909, inclusive, 518 days: 222,408 divided by 518 equals 432 million gallons daily draft to San Francisco; provided all reservoirs be secured and utilized this source under this assumption is sufficient to meet demands of the region around the Bay of San Francisco when reinforced from a full development of Lake Eleanor."

And thereupon the following proceedings were had:

"Mr. BARRETT.—Q. What was the engineering significance of that note?

A. It is to this effect, that if there was a full development of Lake Eleanor and the related sources of supply, the amount of water that could be produced on the Mokelumne River would be sufficient

(Testimony of C. E. Grunsky.)

to meet the demands of the region about the Bay of San Francisco. I should take it that whoever wrote this into this report was of that opinion."

On cross-examination Mr. Grunsky testified that he could not say positively that he had ever seen the pencil memorandum or addendum last referred to before it was shown to him on the witness stand; that he had no recollection on the subject, and that if he had seen it he did not think he would have noticed it in his report to the Army Board even though coming from Mr. Manson. He also testified in connection with the Bartell-Manson report as follows:

Mr. BLAKE.—Q. Now, I want to call your attention to the Bartell-Manson report and ask you to state wherein it lacks completion for the purpose of informing the Advisory Board of Army Engineers or the Secretary of the Interior with reference to the data called for by the order of continuance of May 27, 1910?

The COURT.—You mean wherein it falls short of containing data such as the Army Board required?

Mr. BLAKE.—No, the order of the Secretary of the Interior.

The COURT.—Yes, that goes without saying; there is no necessity of repeating that every time, Mr. Grunsky, on your direct examination you said the Bartell report was not really a finished report, that it was merely the furnishing of data to a superior; he now asks you wherein it falls short [266] in its elements of a finished report for that purpose?

(Testimony of C. E. Grunsky.)

A. It is incomplete in that it does not review the entire situation on the Mokelumne River. It deals with the quantity of water that can be produced on the Mokelumne under certain assumed storage conditions; it gives the cost estimate of a project.

Mr. BLAKE.—Q. Are you familiar with Mr. Manson's handwriting?

A. Yes. This says: 'Showing an estimated cost of the system of $40,978,680.'

Q. For the supply of how much water daily to San Francisco? A. 200,000,000 gallons daily.

Q. Instead of asking you, where in your opinion the report, if at all, shows that it was intended to be a complete report with reference to a water supply from that source to San Francisco?

A. The cover of the report is labelled 'Mokelumne River as a Water Supply for the City and County of San Francisco, April 24, 1912.' The report is addressed to Mr. Marsden Manson, City Engineer. The copy that I have in my hand has no signature.

Q. Well, you recognize it to be the so-called Bartell report, do you not?

A. I recognize this as the report which has been referred to as the Bartell report.

Q. I call your attention to the matter at the top here. What would that signify with reference to the object in furnishing that data as a completed report upon the matter it contained?

A. The note which you refer to is 'Ready for typing except refer note (now) to Bartell, M. M.' the M. M. undoubtedly means Marsden Manson."

(Testimony of C. E. Grunsky.)

The witness further testified with respect to the maps in the Bartell report, as follows:

"The first sheet is entitled 'Drainage Basin of the Tuolumne River, above Electra, showing private and public lands therein.' This sheet was incorporated in my report.

The second sheet is 'Mokelumne River Drainage Basin, drainage and Isohyets.' These are lines of equal amount of rainfall. This was also incorporated in my report as I recall it now.

Sheet No. 3 is the sheet already referred to, showing the mass curve of run-off, Mokelumne River. That was incorporated in my report.

Sheet No. 4 is a regional map, showing the location of conduits from different sources of water supply for the City of San Francisco. This map was not incorporated in my report but similar information was.

Sheet No. 4a, is a profile map showing the elevation of the ground along a proposed conduit route. It is entitled 'Mokelumne River Project, Profile of conduits and pipe lines from Electra [267] to San Francisco.' This was not incorporated in my report, but a similar profile map of my own was incorporated.

Sheet No. 5 is entitled 'Rainfall and Run-off studies Feather River to Merced River, inclusive, Sierra Nevada Mountains, California.' This was not incorporated in my report.

Sheet No. 6 shows 'Rainfall and run-off studies Feather River to Merced River, Sierra Nevada

(Testimony of C. E. Grunsky.)

Mountains, California, run-off curves.' On this sheet are a large number of curves showing the relation between rainfall and run-off. The curve is compared with the amount of water flowing in the various streams or vicinity from the Sierra Nevada Mountains. Of these curves the one entitled 'High Sierras run-off curve based on all available data of the Tuolumne River, Stanislaus River, Mokelumne River, American River, Bear River, Yuba River, for the season 1909-10 inclusive, M. J. Bartell' was incorporated in my report; the other curves were not.

. . .

Q. Just take 'Plaintiff's Exhibit 22,' Mr. Grunsky, and refer to the first diagram tabulation that appears in the main report itself, entitled 'Mokelumne River run-off, inches, depths, the depth of catchment area' and state whether or not that was incorporated in your report. A. It was not.

Q. Turn to the next one, which is entitled 'Mokelumne River Drainage Area, tributary to Electra, 537 square miles'; was that tabulation included in your report?

A. Not in the form in which it is here presented.

Q. Turn to the next one, which is entitled 'Mokelumne River Drainage Area, tributary to Electra period 1906-07 and period 1908-09, inclusive, 537 miles'; was that included?

A. Not in this form, but all of this information and I think these figures are given, the guagings that were made by the United States Geological Survey, and as far as they were available they are

(Testimony of C. E. Grunsky.)

in my report. That applies to the other diagram also.

Q. I hand you a map entitled 'San Francisco Water Supply Investigation, Mokelumne River, discharge and possible utilization, by C. E. Grunsky': That shows that that data was drawn from what source?

A. This data was drawn from the records of the State Engineer's Department for the years 1879 to 1884; from the United States Geological Survey from 1896 to 1900; from the records of the United States Geological Survey from 1905 to 1910. I am not sure with referenc to the data from 1896 to 1900. That may have been approximated from guagings of a nearby river. [268]

Q. Now I will ask you in connection with this same subject matter, whether or not that represents any original work done in this matter by Mr. Bartell?

The COURT.—What are you referring to,—the paper which you showed him?

Mr. BLAKE.—Yes. What is that paper entitled, Mr. Grunsky?

Mr. BARRETT.—Is that part of the Bartell report, Mr. Blake?

Mr. BLAKE.—Yes, so I understand.

Mr. BARRETT.—Well, just a minute. I object to that as immaterial, irrelevant and incompetent and not cross-examination.

The COURT.—He has not offered it.

Mr. BARRETT.—But he is making inquiries

(Testimony of C. E. Grunsky.)
about what it is.

The COURT.—He has asked the witness about it.

Mr. BLAKE.—Q. Have you ever seen that before? A. I have.

Q. This is separate and additional data prepared firsthand, is not in the catchment?

A. I think that is a study which was based upon the rainfall in that region.

Q. Now, I ask you whether or not the tabulation which I just showed you, is not the same tabulation that appears in this Bartell report. The pages are not numbered.

A. The insert in the report contains more information than the blue prints which you were just showing me.

Q. Yes, than the photographic copy.

A. It cannot be a photographic copy of the sheet that is in this report.

Q. Now, for the purpose of correcting the record on this matter, I show you the sheet in 'Exhibit 22,' and a similar sheet in the photographic copy which is No. 43. They are identical, are they not?

A. Yes.

Q. And that would show, as you have testified, original data obtained by Mr. Bartell in addition to what the Government reports showed with reference to the same matter?

A. Yes, I think it does, and I think it is the same original material I used in preparing the diagram which was shown here a moment ago.

Q. You used the same data to prepare your report?

(Testimony of C. E. Grunsky.)

A. I used whatever I could get from Mr. Bartell.

Q. But that particular map and diagram was not used by you in your report except as you transferred the matter into your report?

A. That is, the tabular matter, and I used the material that is in that."

Thereupon the following proceedings were had:

"Mr. BLAKE.—Q. I call your attention to what apparently would be a photographic copy of this map, entitled 'Map of North Fork Reservoir Site, Mokelumne River,' and which has been testified to be a part of the Manson report, 'Plaintiff's Exhibit 22'; now, [269] will you state whether or not that map is not in the Bartell report, if that is the one you refer to?

A. That is a map which was made by Mr. Terry for Mr. Manson, entirely independent of the Bartell report; that is some of the information that was not in the Bartell report, showing that the Bartell report was not a completed report.

Q. Was this Terry map used by you as you received it from the city in presenting the same matter to the advisory board in your report?

A. It was used by me, yes, sir.

Q. Would that be true of the legend on the map under the designation or title 'Estimated capacity of reservoir site'? A. Yes, sir."

Whereupon the following proceedings were had:

"Mr. BLAKE.—Q. State whether or not the photographic map appearing in your report here 'Map of North Fork Reservoir Site' is a photograph

of this map which I now show you and put in your hands?

A. The photographic copy does not show certain pencil notes that are on the other map. The tabular statement relating to the estimated capacity of the reservoir site as shown on the original map is different from the legend which appears on the photographic copy which I have put into my report.

Q. State what the differences are.

A. The table which appears on the photographic copy was apparently from another table that was pasted or placed upon this map when it was photographed, evidently later information.

Q. State if you can read them, the difference in capacities.

A. The photographic copy—the capacity is noted on the photographic copy for a water surface 315 feet above the foundation elevation; it is here given in acre feet at 82,143; in million gallons, 26,760. On the original map the capacity is given at what appears to be an elevation of the dam of 341 feet; the lowest elevation here noted at the dam site is contour 2484 and the last for which the capacity is noted is 2825. The capacity of the reservoir is noted in acre feet at 122,354.2 and in million gallons 39,866.

Q. What is the difference in million gallons per day?

A. You would have to divide 13,000,000,000 by 365. It would be about 40,000,000 gallons per day.

Q. State, Mr. Grunsky, where with reference to determining the supply of water to San Francisco

(Testimony of C. E. Grunsky.)

under your report—with reference to these capacities where you located your draw-off, with reference to the bottom of the dam? In calculating your capacities in million gallons daily for San Francisco, where did you locate your draw-off?

A. It had no relevancy, as I recall it, to the North Fork Reservoir. The 60,000,000 gallons that I suggested as a possible draught upon the Mokelumne **[270]** River would come from the South Fork, from the Railroad Flat, reinforced with water from the Middle Fork of the Mokelumne River; then that was followed by a statement that if more water were to be developed from Mokelumne River there would have to be storage on the North Fork or elsewhere in a very large amount. The dams that were suggested and that are referred to in my report are explained as being dams of exceptional height, very high, unusually high, such dams as an engineer does not like to undertake. The dam suggested on this map that you that you have just shown me would be a higher dam than the one that was assumed by me as the probable limit, and as shown on the photograph.

Q. As I understand your answer it is that so far as your calculations were concerned you did not go into the matter of reducing these various capacities to million gallons per day out of certain particular reservoirs and locating the draw-off; but suppose, as a matter of fact, that in the Bartell report such calculations were entered into, and that in entering into those calculations Mr. Bartell took his draw-off

over 80 feet above the bottom of his dam, what would you say then would be the effect in reducing the capacity of those reservoirs as a daily supply to San Francisco?

A. I don't think I can answer that question."

Thereafter, on recross-examination of Mr. Grunsky, the following proceedings were had:

"Mr. BLAKE.—We desire to offer in evidence this map (the Terry Map) together with the photographic copy, appearing at the page of Mr. Grunsky's report as to which testimony has been given.

The WITNESS.—May I make an explanation with reference to the answer that I made? I was asked to examine the photographic copy and state from what elevation upward the capacity of the reservoir was shown in that tabulated material. It is from an elevation of about 86 feet above what here is noted as the elevation of the foundation. The area of the reservoir at that elevation is about 80 acres and the quantity of water beneath that is very small.

The COURT.—You have figured that out?

A. I have simply refreshed my mind with reference to it. It was so difficult to see the figures that I was not able to state that from a mere inspection.

The following also occurred on the cross-examination of the witness Grunsky:

"Mr. BLAKE.—Q. Mr. Grunsky, are you able to say whether or not the report which you saw in the city's possession and known as the Bartell report was not simply a clean typewritten report, without

(Testimony of C. E. Grunsky.)

any of those maps and tabulations attached to the [271] sheets which you have testified to this morning as not having been given to the advisory board?

A. The Bartell report which I saw had attached to it those flaps or tabular material, to a number of pages.

Q. And had attached to it that particular page which gives additional calculations taken in the field by Br. Bartell?

A. I am quite sure that it did unless there had been a substitution of pages.

Q. That related to the Railroad Flat diagram, to the Railroad Flat reservoir, did it not?

A. I don't understand that question.

The COURT.—He has just asked you about the tabulation attached to a particular page, or rather, to a particular tabulation; now, he says that that relates to the Railroad Flat diagram.

A. He will have to indicate that in the report so I will know what he means; that is what I mean when I say that I am not able to answer the question. This diagram, or rather, the tabulated material to which Mr. Blake calls my attention, is tabulated material bearing the heading 'Mokelumne River drainage area tributary to Railroad Flat Reservoir, period 1896 to 1900.'

Mr. BLAKE.—Q. Was that given to the Army Board in that report?

A. In my report it was not given to the Army Board.

Q. Turning now to that written addenda, in the

(Testimony of C. E. Grunsky.)

handwriting of Mr. Manson, would not your attention have been caught and fixed by the words of that addenda as being almost in the identical words of the order of the Secretary of the Interior upon the city to furnish data of that particular kind and character?

A. It certainly would have struck me that that is substantially what the Secretary of the Interior has asked the city to show. This statement that is made in pencil in the report is a conclusion which is partcularly obvious. The requirement that the Secretary of the Interior made of the city of San Francisco was an absurdity on its face; at the same time it put the city to the necessity of showing that other sources of water than the Hetch Hetchy when taken together with Lake Eleanor would be adequate to supply San Francisco. Now, there was no question that there were such sources, and there is no question that the Mokelumne was one of those sources. The Mokelumne River, in conjunction with Lake Eleanor and with the developments about the Bay of San Francisco would have been a supply that might have furnished water to San Francisco until this city has a population somewhere between 4,000,000 and 5,000,000 people, but that statement as it was made is based upon certain assumptions that are clearly stated in connection with the pencil statement." . . .

"Q. If you had taken your data from the Bartell report as to the reservoir capacity, do you recall how much capacity you would have gotton on the

(Testimony of C. E. Grunsky.)

Mokelumne catchment?

A. The Bartell report in that respect differs from mine mainly in the inclusion of what he calls No. 2 North Fork Reservoir, showing a capacity of about 16,700,000 gallons of water. **[272]**

Q. Have you stated what the difference between the reservoir capacities which you estimate and the reservoir capacities which are estimated in the Bartell report amount to?

A. I have just stated, yes, that that is about the difference. I don't remember exactly what the figures were in the aggregate.

Q. So that when you stated a while ago on direct examination that all of the data that was supplied or might have been supplied by the Bartell report was available through your report to the Army Board, that is hardly correct, is it, Mr. Grunsky?

A. It is absolutely correct, because I included that in my report, and it is in there, and is attached to it and is available to anyone who examines it.

The COURT.—Q. What is the difference, then, Mr. Grunsky—merely in the conclusion you deduce from it?

A. The reason why this particular reservoir was not enumerated in the tabulation was that I had not personally visited that reservoir site; I knew about the others, I had personal knowledge about the others.

Q. I thought you not only took the results from your own calculations, but also from the data given in Mr. Bartell's report.

(Testimony of C. E. Grunsky.)

A. But Mr. Bartell, in this table, as I recall it now, gives the information in this way:

> 'No. 2 North Fork Reservoir, elevation 3850, height of dam 300 feet (?); storage, million gallons, 16,700.'

The cost of dam is then given, and the cost per million gallons, and other information. The reservoir was included by Mr. Bartell evidently with some certainty as to its availability.

Mr. BLAKE.—Q. Why availability? He was there, was he not, on the ground?

A. The question of a reservoir and the availability of a reservoir depends upon the configuration of the ground, upon the character of the dam site, upon the height of the dam required to make the storage effective and worth while, upon the cost that is involved in constructing the dam, and also upon the catchment that is above the reservoir site.''

The witness further stated that when he said he had incorporated two or three Burleson reports and the data of Bartell, he did not mean to indicate that he included every scrap of data that was available, and that he did not want his report and the conclusions drawn therefrom to be bound by the inaccuracies contained in the other reports that he might have appended to his report. Thereupon, the following occurred: **[273]**

The COURT.—I want to ask a question of the witness.

Q. If that is so, Mr. Grunsky, why was it that you did not append the Bartell report to yours when

(Testimony of C. E. Grunsky.)

you sent it in to the Army Board?

A. It is not the custom to include in a report the reports that are made by the subordinates in a department. They are studies that are made for the information of the chief. As chief engineer, I have had reports made by a great many of the assistants, and made use of them as I chose. If I choose to submit the information, I do it; if I think it is unnecessary to do that, I don't submit it.

The COURT.—This matter had been in a manner vised by Mr. Manson, the head of the office?

A. I don't know about that, your Honor, and I doubt it very much. My recollection is that the Bartell report was an unsigned report.

The COURT.—You said you did not remember about this addendum made by Mr. Manson.

I am not sure whether I saw that addendum or not. Even that addendum is not signed. My recollection is that the Bartell report bears on its face the notation that it is the Bartell report. Whether it was a signed report, I am not sure. The custom has always been in the city engineer's office to have manuscripts typed in four or five copies and then those copies are available for use. No particular copy is the original as a rule.

The COURT.—Are all the copies signed?

A. In most cases they would be.

The COURT.—You don't really know, then, whether you had presented to you from the city attorney's (engineer's) office what purports to be

the original with these notations on by Marsden Manson?

A. There is, as I understand it, no original copy of the Bartell report. The Bartell report was at my disposal in the city engineer's office, and I had it in conference with Mr. Bartell so that I knew all about the Bartell report at the time I was using it. I had a copy of it for my own use. As I recall it, my report was a complete report, but it did not have the pencil memoranda on that have been referred to.

The witness' attention was called to the following matter contained on page 160—c of the Freeman report:

"Mr. C. E. Grunsky concludes that it is in all probability not practicable to obtain more than 60 mill. gallons daily from the Mokelumne. Above is shown his profile for a 200 mill. gals. daily supply, which he finds would interfere seriously with irrigation needs, principally because of lack of sufficient storage at low elevations on the North Fork."

In connection with the foregoing the witness stated:

"A. Mr. Freeman states that my conclusion is [274] that in all probability it is not practicable to obtain more than 60,000,000 gallons daily from the Mokelumne. That should be qualified by stating that that is probably the total amount that could be taken from the Mokelumne at the present time and under conditions as they obtain there, knowing the necessity of obtaining a large amount of Mokelumne River water for local use, not as a limit of the

(Testimony of C. E. Grunsky.)

water production that is possible on the Mokelumne.

The witness' attention was also called to the following matter contained at page 160 of the Freeman report, where, after referring to various obsolete sources of information from which the various data contained in the Grunsky report was supposed to have been drawn, Mr. Freeman said:

"All of these previous investigations had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky evidently was impressed with the unwisdom of spending any large sum of money at the present time for further field work in detail, and so bases his statement upon the facts already on record. Moreover, there was not time for any extensive new field work after Mr. Grunsky was called in to take up the work which Mr. Manson had not completed at the time of his illness."

Thereupon, the following occurred:

"Mr. BLAKE.—Now, do you take the position, Mr. Grunsky, that this report which carries the addenda of Mr. Manson is not such a complete report as was within the purview of the order of the Secretary of the Interior?

A. I think that that report is a report within the purview of the requirement of the Secretary of the Interior. I am not responsible for the statements which Mr. Freeman has there made.

Mr. BLAKE.—Q. As a matter of fact, are you not in some doubt as to whether or not all of the data which had been accumulated under Mr. Manson's supervision for two years, from 1910 to 1912,

(Testimony of C. E. Grunsky.)

in regard to these Mokelumne sources, that some of the data was not possibly withheld from you?

A. There was none withheld from me.

Mr. BLAKE.—Q. What about the essential statement of Mr. Manson's?

A. That is not an essential statement.

The witness was then shown the map of the North Fork Reservoir site, known as the Terry Map, whereupon the following occurred: [275]

"Mr. BLAKE.—Q. Can you tell me whether that map ever went to the Board of Army Engineers in that form?

A. It may have gone to the Army Engineers in this form, but it was not submitted to them by me in that form, but it was in the form of a photograph of this map with the change that has been referred to this morning.

Q. The form of photograph which you testify to is the form shown in your report, on page 6, with a legend on a paster.

A. This appears on page 80, of my report, and is called Sheet 6, and with a photographic reproduction of the map as named in its title, with the information in the table, modified from the black line print which you have just showed me.

Mr. BLAKE.—And that modification reduced the capacity of that reservoir by some 45,000,000 daily draft?

A. Not at all. The contour lines are the same as on the other sheet; the table does not carry the information as far as the table on the other map

(Testimony of C. E. Grunsky.)

That is the difference between the two.

The COURT.—Q. What was the cause of that change in that table?

A. I think the conclusion was that the calculation had been carried beyond the reasonable limits of the height of any dam. That was all. Therefore, the reservoir was brought into the calculation at what seemed to be a proper height for the dam at that locality.

Mr. BLAKE.—Q. Is it not true, Mr. Grunsky, that that modification which you say is confined only to a matter of mere calculation—in other words, there could have been no misleading of anybody by this table and diagram under the title 'Estimates, capacity of reservoir site,' there could have been no misleading according to that map, except as to carrying the calculations just a little bit further, in accordance with the height of the dam?

A. This might have been misleading, because the inference would have been, if I submitted this, that I endorsed the higher dam, which I was not willing to do.

Q. Do you testify that that is the only inference that might properly be drawn from the change in the legend there?

A. I do not wish to testify to that; there may be other inferences drawn.

The witness was asked on redirect examination, why he did not consider the notation on the Bartell-Manson report made in the handwriting of Mr. Manson and immediately following the words "The criti-

cal period August, 1907, to December, 1909, inclusive, 518 days, 222,408 divided by 518 equals 432 million gallons daily draft to San Francisco," which said notation is as follows: **[276]**

> "Provided all reservoirs be secured and utilized this source under the assumption is sufficient to meet the demands of the region around the Bay of San Francisco when reinforced from a full development of Lake Eleanor, but the cost is manifestly prohibitive."

was of any engineering value. The witness answered:

"Because it is an obvious statement. The City of San Francisco was receiving from the Spring Valley Water Company about thirty-five to forty million gallons of water per day; the capacity of its developed supplies was about thirty-five million gallons per day. It can develop and is developing on Calaveras Creek on the Alameda side of the bay like amount of water or something approximating that. Lake Eleanor and its related sources are capable of supplying approximately 150,000,000 gallons a day. If the suppositions made in that statement are correct and this amount of water could be obtained, all the rights and reservoir sites acquired and developed, adding 250,000,000 a day to Lake Eleanor and related supplies, plus the amount that is already available to San Francisco, there would have been water enough for a population of about 5,000,000 people.

Q. In a word, you consider it of utterly no im-

(Testimony of C. E. Grunsky.)

portance from an engineering standpoint; is that right?

A. That is the point, yes, sir."

Upon the further cross-examination of Mr. Grunsky the following proceedings were had: [277]

Mr, BLAKE.—"Q. Were you called upon by the city to make, in conjnutcion with Messrs. Hyde and Marks, or by yourself, an examination of the amount of water flowing out of the Alameda creek and available to the city of San Francisco?

Mr. BARRETT.—Objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT.—How does that bear on his direct examination?

Mr. BLAKE.—That would lead up to the question of another suppressed report.

Mr. BARRETT.—What, are you going to abandon this one and take up another one?

The COURT.—Well, the witness has testified that he afforded the Board of Army Engineers all of the data of any material value that had been gathered for the city; if this was such data he can be cross-examined upon it.

Mr. BARRETT.—But this has nothing to do with the Mokelumne. As I understood your Honor's ruling, your Honor limited us very closely as to this Bartell report. We did set out to broaden very much what the city did do for that board by the way of supplying everything it could get hold of—

(Testimony of C. E. Grunsky.)

The COURT.—I made no limitation. You have not offered anything except as to whether he furnished them the data that was contained in the Bartell report.

Mr. BARRETT.—I started out to show the wider scope that the investigation of the city took on this matter, and all that it did supply to the board.

The COURT.—In what respect?

Mr. BARRETT.—In respect to the Mokelumne catchment and its availability.

The COURT.—Exactly, and there was no limitation put upon you there at all.

Mr. BARRETT.—I thought your Honor once said that the only charge was the suppression of this Bartell report, and you would limit us as to what was done with that report.

The COURT.—But that was in connection with the suggestion that all that was of value to the engineers contained in that report had been afforded to the Army Board. I let you show anything that was put in there. [278]

"Mr. BLAKE.—Q. You stated on your direct examination, Mr. Grunsky, as I understood you, that so far as your connection with the city was concerned in reporting on these various water supplies, that there was not anything suppressed from the Army Engineers.

A. I don't know that I stated that. I made a number of reports to the city atorney's office, and I am not responsible for what he transmitted to the Army Engineers.

(Testimony of C. E. Grunsky.)

Mr. BLAKE.—Q. There was a time when there was an interregnum between the time that Mr. Manson was incapacitated and the time that you commenced to report to some superior officer in the city engineer's department. That is true, is it not?

A. You mean by that that for a time Mr. Manson was not capable of discharging his duties as city engineer while there was nobody there to take his place? . . . There was an assistant city engineer there, and the work in the city engineer's office went on as before. But special attention should be devoted, or was required for the investigation of a water supply. As soon as it was ascertained that Mr. Manson was incapacitated, which was, I presume, a few days after he found it necessary to take a complete rest, I was asked to take charge.

Q. This will mark the distinction as to how your reports were handled. Up to August 1st, when your report on the Mokelumne went into the Army Board, you were reporting directly to the Army Board were you not?

A. No, I was never reporting directly to the Army Board.

Q. I so understood you to testify this morning.

A. Oh, no, I did not so intend to be understood.

The COURT.—This report of yours was made for the city authorities?

A. It was made for the city authorities, and was sent to Mr. Percy Long, the city attorney, who was handling the city's case.

(Testimony of C. E. Grunsky.)

Mr. BLAKE.—Q. Then you don't intend to be understood as having testified in any way to-day that your report in the form you made it ever did get to the Army Board?

A. Oh, yes, I do want to say so, and I do know that; I sa wit at the office of the Army Board, and handled it there, and I was conversant with that fact.

The COURT.—Q. You do not know of your own knowledge, then, what other data and engineering facts that had been gathered by the city were furnished to the Army Board?

A. No, there may have been a great deal furnished that I have no knowledge of.

Mr. BLAKE.—Q. With reference to your employment at or about this time to furnish a report of the run-off from Alameda Creek proper of the Spring Valley Water Company, that report of yours was turned in when?

Mr. BARRETT.—That is objected to as not cross-examination, and as immaterial, irrelevant and [279] incompetent.

Mr. BLAKE.—If your Honor please, we would like to follow this up—

The COURT.—Is it in response to his direct examination?

Mr. BLAKE.—He made a most general statement with reference to the work he did for the city, and that it got to the Army Board.

The COURT.—If it is a part if his work that went to the Army Board, it is relevant.

(Testimony of C. E. Grunsky.)

Mr. BLAKE.—That is what it is going to, your Honor.

The COURT.—What did he testify to about that? He didn't testify to that report.

Mr. BLAKE.—He did not testify to that report, but it is a part of the services he performed for the city in furnishing data to the Army Board.

The COURT.—If it was work furnished for that purpose, you have a right to cross-examine him upon it.

Mr. BLAKE.—Q. You have not testified as to whether you were employed to make such a report.

A. I was.

Mr. BARRETT.—Your Honor, I made an objection. Is my objection overruled?

The COURT.—Before I rule on that objection, I will ask this question:

Q. Was that work you did with reference to Alameda Creek, was the result of your work a part of the data you furnished to the Army Board?

Mr. BLAKE.—Or that should have been furnished under the order?

A. That was work done at the request of Mr. Freeman for his information and in connection with his work, and I think that report was addressed to Mr. Freeman. It may have been addressed to the city attorney.

The COURT.—Q. But it was for the information of the Army Board, was it?

A. It was supposed to be used by Mr. Freeman for that purpose. **[280]**

(Testimony of C. E. Grunsky.)

The COURT.—The objection is overruled."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 48.

To said question the witness answered.

"The statement I made this morning with reference to turning in everything to the Army Board related to the matter that bore upon the report that was then under discussion."

"Mr. BLAKE.—Q. Do you know what became of that report of yours that you turned in? Did it go to the Army Board?

Mr. BARRETT.—That is objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT.—The objection is overruled."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 49.

To said question the witness answered:

"The report was delivered very late."

"Mr. BLAKE.—Q. When was it delivered?

Mr. BARRETT.—We make the same objection."

To said question the witness answered:

"I don't remember the date. I have not had occasion to look at it for a long time. I think [281] that was delivered some time in October or November.

(Testimony of C. E. Grunsky.)

THE COURT.—Q. Delivered to whom?

A. I think to the city attorney, or perhaps directly to Mr. Freeman, I don't recall that now.

MR. BLAKE.—Q. You did not deal with Mr. Freeman directly under your employment by the city, did you?

A. Oh, yes. Oh, yes. Mr. Freeman was acting for Mr. Long, as Mr. Long's agent in this entire matter. Mr. Freeman and Mr. Long were handling the case in Washington for the city.

Q. It was all a matter of gathering data for the same purpose?

A. Yes, sir, gathering data. There had been quite a number of questions submitted to me originally which had nothing to do with the Mokelumne River. Some time in the spring of 1912 a telegram came from Mr. Freeman requesting the city to have Professor Marks of Stanford, Prof. Hyde of the University of California, and myself review the data that was obtained from the Spring Valley Water Company with reference to the flow of Alameda Creek and the tributary known as the Calaveras Creek. He thought that the total output of water from those sources was much less than was claimed by the Spring Valley people. That investigation continued through a number of months. It was not completed until late in the summer, and the information was not finally reviewed by Mr. Freeman until the hearing was well under way. So that that material was delayed in its transmission.

MR. BLAKE.—Q. Were your conclusions upon

(Testimony of C. E. Grunsky.)
that investigation favorable or unfavorable to the Spring Valley Water Company's contention?

MR. BARRETT.—I object to the question as immaterial, irrelevant and incompetent, calling for the opinion and conclusion of the witness and not cross-examination; upon the further ground that it is not the best evidence.

THE COURT.—I don't see the materiality of that.

MR. BLAKE.—I might put it in this way, in the terms of the city's contention, as to whether or not it minimized or exaggerated the flow of water out of that basin. In other words, was it against the interest of the city with reference to their claims as to the amount of water from that source.

MR. BARRETT.—Objected to as immaterial, irrelevant and incompetent, not proper cross-examination.

THE COURT.—It is not a question of whether it was against the city's interest or not; it is a question whether the results of his investigation were furnished to the Army Board.

MR. BLAKE.—I think motive is material in this matter. We have to meet the question of motive. We opposed it by questions of motive. If it was in the interest of the city to supppress this report, it might throw some light why it was not handed to the Army Board until it was drawn out from Mr. Freeman in the city of Washington on November 25, [282] when this order to show cause was returnable.

(Testimony of C. E. Grunsky.)

THE COURT.—In that view, I will let you ask about it.

MR. BARRETT.—I object to it as immaterial, irrelevant, and incompetent, calling for the opinion and conclusion of the witness, and not cross-examination. We save an exception. I would add the additional ground, your Honor, that it is not the best evidence.

THE COURT.—The objection is overruled."

Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 50.

To said question the witness answered:

"I cannot say as to whether it was favorable or unfavorable to the City or to the Spring Valley Water Company. The finding with reference to the quantity of water flowing in Alameda Creek was not at great variance with what was claimed by the Spring Valley Water Company."

[Testimony of Marsden Manson, for Defendants.]

MARSDEN MANSON, a witness called on behalf of the defendants, testified that he was city engineer of San Francisco from January, 1908, until the middle or latter part of 1912; that he held that position at the time the Secretary of the Interior of the United States appointed a Board of Army Engineers to report to him on the water situation of San Francisco and that he came in contact with that board in his official capacity and with the principal engineer in charge of all of their investi-

(Testimony of Marsden Manson.)

gations, Mr. Wadsworth. He further testified that all data collected by his office was sent to the board directly and part of the time to Mr. Wadsworth. He also testified that he had made personal investigations of the Mokelumne and was familiar with its general features; that Mr. Aston in making representations with regard to Mr. Manson's addendum regarding the quantity of water available upon the Mokelumne, had not included a further addendum by Mr. Manson which stated, "but the [283] cost is manifestly prohibitive."

Mr. Manson's attention was then called to an instruction given by him on the same page of the Bartell report containing the conclusion regarding quantity and costs of taking water from the Mokelumne as follows:

> "put in capitalized value of Sierra & San Francisco Power Company plus $6,000.000 Blue Lakes plus cost of developing 60,000,000 gallons given."

and the witness stated that the $6,000,000 represented the price asked for the Blue Lakes properties.

Upon cross-examination Mr. Manson testified that at the time he ordered the Blue Lakes properties to be put into the final report at $6,000,000, he knew they were not worth that figure; but that was the figure placed upon the properties by the Sierra Blue Lakes Water & Power Company, and that he knew of the rule of law that the higher use—the domestic use—gave the right to a municipality to

(Testimony of Marsden Manson.)

condemn such properties, as against their use for hydro-electric purposes, or for mining or for anything like that. He further testified that the Bartell-Manson report was quite complete, covering Mr. Bartell's instructions.

The witness further testified upon cross-examination that he was present at the meeting of the San Francisco Civic Center on November 5, 1913, when there was a discussion of the water supply problem; that he recalled that Mr. O'Shaughnessy and Mr. Long spoke there and that Mr. Aston read a paper referring to the particularly essential statement that is relied upon in the Bartell-Manson report and that the witness did not take any exceptions to any unfair deductions or statements made by Mr. Aston at that time. [284]

Thereupon the following occurred:

MR. BLAKE.—You stated that all of this material and data that had been prepared on the part of the city with reference to the Mokelumne sources was made available to the Board of Army Engineers; I wish you would take the original Bartell-Manson report, 'Plaintiff's Exhibit 22,' and state with reference to the tabulations, and so forth, which appear in the report proper and state whether they ever went to the Army Board?

A. The final transmission of all of the data in that and other reports to the Board of Army Engineers was done after I was incapacitated from work in the office. Whilst I was there all data in the office was made available to Mr. Wadsworth whenever he wished it.

(Testimony of Marsden Manson.)

Q. Do you not know of your own knowledge whether or not Mr. Wadsworth or any member of the Advisory Board knew of this corrected and annotated copy of the Bartell-Manson report at any time?

A. I do not."

Upon plaintiff's case in chief it was shown that after he had discovered the Bartell-Manson report in the office of the city engineer, in June, 1913, the following letters were exchanged between him and Mr. Wadsworth in relation thereto:

[Letter, Dated July 1, 1913, from Taggart Aston to H. H. Wadsworth.]

San Francisco, Cal. July 1, 1913.

"Mr. H. H. Wadsworth,
Assistant Engineer, U. S. Engineers,
Customhouse, San Francisco, Cal.

Dear Sir:—

Will you kindly advise me in writing if there was submitted to or used by the Advisory Board of Army Engineers to the Secretary of State (Interior) in their report of February 19, 1913, a certain report dealing exclusively with the Mokelumne River as a source of water supply to San Francisco made by Mr. Bartell, assistant city engineer, to Mr. Manson, city engineer, in April, 1912, and containing some 15 elaborately prepared maps and diagrams relative to the proposed Mokelumne supply—this presumably being the data which the Secretary of the Interior had requested that the city 'should secure and furnish at its own expense and with due diligence to the Advisory Board of Army Engineers, so that they

could make their determiation upon outside sources' such as the Mokelumne River.

Further, kindly inform me if you have ever seen, or heard of, the Bartell report above referred to, except through the medium of newspapers within the past few days, or through my telephone message [285] to you last week.

I am about to give evidence before a congressional committee regarding this matter and am desirous of having this information.

Yours very truly,
TAGGART ASTON."

[Letter, Dated July 1, 1913, from H. H. Wadsworth to Taggart Aston.]

"July 1, 1913.

Mr. Taggart Aston,
Consulting Civil Engineer,
San Francisco.

Sir:

Replying to your communication of this date, I would say that the report mentioned by you, viz: one made by Mr. Bartell, assistant city engineer to Mr. Manson, city engineer, dealing exclusively with the Mokelumne River as a source of water supply for San Francisco, does not appear in the list of reports received from the officials of the city, as published in the report of the Advisory Board of Engineers.

I am very confident that no such report was submitted to the board. The only complete file of all reports received is at the office of the Secretary of the Interior in Washington.

(Testimony of Marsden Manson.)

Answering your second question, I have never seen nor do I remember hearing of such a report until you mentioned it over the telephone a few days ago. I might add, however, that during the progress of investigations conducted by the city I had several interviews with the city engineer and with Mr. Bartell. Considerable at least of data obtained and their deductions therefrom were made accessible to me, and were used in preparing my report to the board.

Very respectfully,

H. H. WADSWORTH."

Upon the further cross-examination of the witness Manson, the following occurred:

"Mr. BLAKE.—You have stated that your own personal investigations on the Mokelumne were made prior to this order of the Secretary of the Interior with reference to what data the city should furnish on the show cause order; is not that *that* true?

A. I think that is the case though I may have gone up there subsequently; I cannot recall it if I did.

Q. You heard this read repeatedly, from page 160 of the Freeman report, with reference to the date that Mr. Grunsky relies upon, and he speaks of your previous study and information. He refers to these previous reports here, does he not?

A. Yes, sir.

Q. He does not in any way refer here to any [286] studies that were made between the years

1910 and 1912 by you, does he?

The COURT.—Mr. Manson has stated that he did not make any new and original investigation.

Mr. BLAKE.—If your Honor please, that is exactly the point I am trying to reach by cross-examination. This Bartell report is made up entirely upon the basis of new and original studies.

The COURT.—I am talking about Mr. Manson, personally.

Mr. BLAKE.—Then I will reach that in another way, your Honor. Q. It is a fact, is it not, Mr. Manson, that from the year 1910 to 1912 there was a continuous line of work being done under your direction as city engineer for the purpose of determining the question of water supply out of the Mokelumne catchment?

A. There was; it was not continuous, but it was at frequent intervals.

Q. In fact, each and every one of those thirteen maps and diagrams, including the tabulations attached to and made a part of the principal report of Mr. Bartell represents that particular special work, does it not? A. Yes, sir.

Q. And, therefore, the conclusion is an absolute one, is it not, that so far as Mr. Freeman is concerned, he omits all reference to that work?

A. I think not.

Q. 'All of these previous investigations'—referring to your previous investigation and Mr. Grunsky's knowledge from boyhood and Colonel Mendel's report—'had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky

(Testimony of William Bade.)

evidently was impressed with the unwisdom of spending any large sum of money at the present time for further field work in detail and so bases his statement upon facts already on record: Moreover, there was not time for any extensive new field work after Mr. Grunsky was called in to take up the work which Mr. Manson had not completed at the time of his illness. I have not visited the region myself, but have carefully reviewed the data presented by Mr. Manson and Mr. Grunsky.'

Mr. BARRETT.—That is objected to as irrelevant, immaterial and incompetent, and not proper cross-examinaton.

Mr. BLAKE.—Q. (Continuing.) Is not that true? A. I think not.

The COURT.—I don't think this is at all material, or in cross-examination.''

[Testimony of William Bade, for Plaintiff, in Rebuttal.]

On rebuttal, the plaintiff called as a witness William Bade, who testified that he was a Professor of Semetic Literature and Achaeology in the Pacific Theological Seminary, and that he was in Washington from November 25 to 30th, attending the hearings upon the return of the show cause [287] order before Secretary Fisher, and that he was present throughout said hearings. Thereupon the following occurred:

''Mr. BLAKE.—Q. State whether or not at those hearings anything came out with reference to the suppression of any engineering reports which had

(Testimony of William Bade.)

been prepared for and on behalf of the city?

Mr. BARRETT.—Objected to as immaterial, irrelevant and incompetent and not rebuttal.

The COURT.—What is the object of this?

Mr. BLAKE.—This is for the purpose of showing with reference to its character as rebuttal—I would state that it appears in defendants' case that all of the engineering data which the city was under duty to furnish to the Army Board under this order did in fact reach this particular quarter, the Advisory Army Board, as and when called for in the order; I now tender proof that at the time of the hearing of this show cause order before Secretary Fisher it became apparent that the city had withdrawn and suppressed the so-called Grunsky-Marks report with reference to the Alameda Creek run-off, the question as to which was raised in Mr. Grunsky's testimony.

The COURT.—I don't know that I exactly understand you. How do you propose to show that?

Mr. BLAKE.—By a witness who was present at the hearing and who knows of the transaction as a matter of fact.

The COURT.—But the question here is narrowed to a question whether these officials suppressed anything fom the Army Board.

Mr. BLAKE.—Yes, the city officials. It has been testified to here that Mr. Freeman was representing the city.

The COURT.—Well, we will see what it is.

Mr. BLAKE.—Q. Was Mr. Freeman present at the hearing? A. Yes, sir.

Q. And Mr. Freeman was there in the representative capacity of furnishing or accounting for the furnishing of data which the Secretary had called for under the order of continuance, the show cause order?

Mr. BARRETT.—Objected to as calling for the opinion and conclusion of the witness and not the best evidence.

Mr. BLAKE.—That is direct and original evidence.

The COURT.—He certainly can testify as to what his ostensible authority was there.

Mr. BARRETT.—But that is not the question.

The COURT.—Unless it is shown that he was not there, that would be good.

Mr. BARRETT.—We take an exception.

Which exception the defendants hereby designate as their

Exception No. 51.

[288]

To which question the witness answered:

"Mr. Freeman expressly stated he was representing the city officials and Mr. Fisher so accepted him.

Thereupon the following occurred:

Mr. BLAKE.—Q. State whether or not anything came out at that hearing with reference to any suppressed report which had not been furnished up to the date of that hearing?

Mr. BARRETT.—We object to that as immaterial, irrelevant and incompetent and not rebuttal. In the first place this has to do with events in 1912, before Mr. Aston had any connection with this thing

at all. In the next place, it seems to me that at the last minute it would shove this case from the question of this suppressed report—the Bartell report—on to other matters which are not at issue here. All of the alleged libel and all that sort of thing, and the slander, as set forth, had to do with that particular report. It is true your Honor allowed the witnesses to say that they did not suppress anything but that was with reference to matters before the Army Board.

The COURT.—So far as that is concerned, it is the same thing. I would not consider it relevant but for the fact that your witnesses have all testified that they suppressed nothing.

Mr. BARRETT.—From the Army Board.

The COURT.—Well, the Army board represented the Secretary of the Interior.

Mr. BARRETT.—I don't make that point as an artificial technical objection; but your Honor has confined this case to the question of whether their charge that this Bartell report was suppressed was made in good faith and had any foundation. Now, in the course of that and as illustrating how limited this collateral testimony was, these witnesses said there was nothing kept from the Army Board; therefore, unless this case is going to proceed on to another matter, a hearing before the Secretary, it has to be confined not for technical but for substantial reasons to the dealings of the city with the Army Board.

The COURT.—But this is the situation; the question here is whether this Bartell report was sup-

pressed; your witnesses have all testified that they afforded to that Army Board—because that board represented the Secretary of the Interior—all of the data that was available for the purpose. If it should appear in rebuttal that some data was suppressed the jury would not be bound by their statements that they afforded all that was material in the matter of the Bartell report. [289]

Mr. BARRETT.—I am only trying to keep the case within the confines reasonably marked out for it. Take the situation at this point; those men who were our witnesses have left here; it was not called to their attention that there was going to be any question of suppressing anything before Secretary Fisher.

The COURT.—Oh, no; the question is not here whether it was suppressed before Mr. Fisher; the question is whether the question came up there of any data having been suppressed. That would relate not only to the Army Board but to the entire inquiry. I think it is proper in view of the testimony on behalf of the defendants.

Mr. BARRETT.—We save an exception."

This exception the defendants hereby designate as their

Exception No. 52.

To said question the witness answered:

"Yes, sir."

"Mr. BLAKE.—Q. State what if anything appeared at this hearing as coming from the city, or the representatives of the City of San Francisco, which showed that there was in existence a report

with reference to any available water supply to San Francisco which had not reached the Army Board or the Secretary of the Interior up to that time?

Mr. BARRETT.—Objected to as immaterial, irrelevant, incompetent and not rebuttal, not the best evidence and calling for the opinion and conclusion of the witness.

The COURT.—Let him answer it and see what it leads to.

Mr. BARRETT.—Exception."

This exception the defendants hereby designate as their

Exception No. 53.

To said question the witness answered:

"On the complaint of Mr. McCutcheon to Secretary Fisher that the Marks-Grunsky-Hyde report, that they had never been permitted access to it although repeated requests had been made; upon that representation by Mr. McCutcheon, Secretary Fisher asked for that report, if there was such a report.

The COURT.—Q. Asked who?

A. Asked Mr. Freeman, representing the city. Mr. Freeman then produced the report and said it was the only copy he had, and turned it over to Secretary Fisher, and he to the Advisory Army Board who also stated that they had not had access to it.

Mr. BARRETT.—I now move to strike out all the answer, including that which followed the [290] question of the Court interrupting the witness, upon the ground that it is immaterial, irrelevant and incompetent, hearsay, and not the best evidence.

The COURT.—I am inclined to think that the statement of the Army Board in the presence of the Secetary would be hearsay.

Mr. BARRETT.—Mr. McCutcheon was a representative of Spring Valley, not of the city.

Mr. BLAKE.—Q. How far does your Honor's ruling extend? Only as to what concerns the Army Board?

The COURT.—The testimony that they had never seen it.

The COURT.—Q. What did Mr. Freeman say when this inquiry arose, about the suppressed report?

Mr. BARRETT.—I object to the question as immaterial, irrelevant and incompetent and not rebuttal and calling for the opinion and conclusion of the witness.

A. Mr. Fisher called for the report.

Mr. BLAKE.—Q. What did Mr. Freeman say?

Mr. BARRETT.—Same objection, your Honor."

The Court overruled the objection. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 54.

To said question the witness answered:

"Mr. Freeman then handed over the report and said it was the only copy he had, but he was willing to turn it over to Secretary Fisher and the Army Board."

"Mr. BARRETT.—I now move to strike out all the testimony of the witness with respect to the proceedings before Secretary Fisher upon the ground

(Testimony of Taggart Aston.)

that they are immaterial, irrelevant and incompetent and not rebuttal and not the best evidence and hearsay."

The Court denied said motion of counsel for the [291] defendants. Counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 55.

Upon cross-examination the following occurred:

"Mr. BARRETT.—Q. Where is Mr. Freeman now, do you know?

A. I suppose at his home in Providence, Rhode Island."

[Testimony of Taggart Aston, in His Own Behalf (in Rebuttal).]

Thereafter on rebuttal the plaintiff testified as follows:

"Mr. BLAKE.—Q. I will ask you whether or not this exhibit, which is marked 'Plaintiff's Exhibit 27 for Identification,' was attached to any data that was attached to the Bartell-Manson report?

A. This was copied from the paster that was put over that large map on which they had arbitrarily reduced the amount of water in the North Fork Reservoir for the presentation of that map to the Army Board. This shows, as Mr. Grunsky pointed out, an assumed draw-off of 86 feet above the bottom of the reservoir, which really amounts to about two months' supply to San Francisco at the present time to bring them over a dry period—an arbitrary reduction of the amount of storage in that particular reservoir."

(Testimony of Taggart Aston.)

Plaintiff's Exhibit 27 for identification was then offered in evidence. Counsel for the defendants objected to said document on the ground that it was immaterial, incompetent, irrelevant and not rebuttal. The Court overruled said objection and counsel for the defendants excepted to said ruling, which exception the defendants hereby designate as their

Exception No. 56.

Said document is as follows: [292]

[Plaintiff's Exhibit No. 27—Table of Quantities, Norfolk Dam & Res.]

TABLE OF QUANTITIES—NORTH FORK DAM & RES.

Contour.	Dam Quantities.			Reservoir Quantities.				
						Vol. Bet.		Above 2550
	Area		Vol.	Area		Con. Acre	Capacity	Million
	Sq. Ft.	Int.	Cu. Ft.	Acres.	Int.	Ft.	Acre Ft.	Gallons.
2464	24,854	Foundation elev.						
2500	41,673	36	1,197,468					
2550	55,651	50	2,433,100	80.1				
2600	58,766	50	2,860,425	168.8	50	6,222.5	6,222.5	2.027
2650	57,202	50	2,899,200	286.7	50	11,387.5	17,610.0	5.737
								(3710)
2700	47,090	50	2,607,350	428.1	50	17,870.0	35,480.0	11.558
								(5.821)
2750	29,876	50	1,924,150	640.3	50	26,710.0	62,190.0	20.260
								(8.702)
2779	Water Surface			735.8	29	19,953.0	82,143.0	26.760
2789	22,361	39	1,081,621					
Strip	134,471	10	1,344,710					
Total			16,347,974			82,143.0		
			605,480					

[Endorsed]: "No. 15,780. U. S. Dist. Court, Nor. Dist. of Cala. Pltff's Exhibit 27. (M) Clerk."

The foregoing table is the same as that appearing on the map of North Fork Reservoir site, being the map designated as "Sheet No. 6" in the report made by the witness Grunsky.

Thereupon counsel for the plaintiff offered and there was received in evidence a copy of the original "Terry Map," a photographic copy of which is as follows: [293]

MAP
OF
NORTH FORK RESERVOIR SITE
MOKELUMNE RIVER CALIFORNIA
SIERRA BLUE LAKES WATER & POWER CO'S PROJECT
BOARD OF PUBLIC WORKS SAN FRANCISCO, CALIFORNIA.
SURVEYED UNDER THE DIRECTION OF MARSDEN MANSON CITY ENGINEER.

BY CHARLES W TERRY

DRAWN BY [illegible]
TRACED BY Eugene Burgess
Sept 1911
Scale.

Transit Book No 25.
Level Book No 28

The foregoing map also appeared as Sheet No. 6 in the Grunsky Report. Across the legend of said map there was pasted instead thereof the calculations hereinbefore set forth as "Plaintiff's Exhibit 27" for identification, which calculations did not appear on the original Terry Map.

The plaintiff further testified upon rebuttal, that the reason why he had not called attention to Mr. Manson's statement that the cost of the Blue Lakes project was "manifestly prohibitive" was because he expected an inquiry and fully intended to show that Mr. Manson's estimates were padded; that they were not prepared upon the same basis as the Hetch Hetchy, the unit costs were nearly double, and some of the items were nearly treble what they ought to be; that none of the Mokelumne reports were prepared upon the same basis as the Freeman report.

Thereupon the following occurred:

Mr. BLAKE.—I would like you to turn to the page in the Bartell report which contains the essential statement, so-called, and give your explanation of that added matter and how it came to be photographed right side up?

The WITNESS.—I will first give my explanation why I put this statement as I did put it in communicating with Washington. I considered the cost did not come in at all, for this reason; the [295] Secretary of the Interior in his order stated that if the amount of supply was found available from another source, that then Hetch Hetchy should be eliminated, and Hetch Hetchy should not be included unless it was an absolute necessity. Therefore, the

only matter of interest to the congressional committee and to my mind was the amount of supply. Now, as regards the cost, this report of Mr. Bartell's is padded to such an extent that it goes on to the point of reductio ad absurdum. He has $40,000,000 for bringing in a 60,000,000 gallon supply—

Mr. BARRETT.—Just a minute. I object to this as not rebuttal.

The COURT.—That is not rebuttal. All you are asked is to state why in your communications to the officials in Washington you did not call attention to this further statement that appears on the opposite page. It appears in a peculiar sort of way.

The WITNESS.—It appears like this on this page, you would have to hold it up to the light to see it.

The COURT.—I suppose this line running over here is intended to connect it up.

The WITNESS.—And further, I consider that Mr. Manson had perforce to arrive at this conclusion because of Mr. Bartell having found this essential amount of water. It struck me at once that Mr. Manson, who is in favor of Hetch Hetchy, adopted the subterfuge of saying that the cost was exorbitant, and he fixed that cost on his estimate at $40,000,000, which is absolutely preposterous, because in making that estimate they came around about 50 miles, they don't take the proper course to start with—and then—

Mr. BARRETT.—(Interrupting.) Just a minute. I object to this as not rebuttal.

The COURT.—This is not rebuttal.

Mr. BLAKE.—Your Honor, it does seem to me to be absolutely rebuttal.

The COURT.—It is rebuttal to permit him to state why he omitted that.

Mr. BLAKE.—Just proceed with that.

Mr. BARRETT.—Why, he didn't photograph it right.

The COURT.—That is not what he is asking him. That doesn't make any difference.

The WITNESS.—That is the way it would photograph (indicating).

The COURT.—Yes.

The WITNESS.—If you have any knowledge of photography that is the way it photographed. If you fold it this way you will see just where this comes.

Mr. BARRETT.—Why didn't you photograph the page it was on?

Mr. BLAKE.—I will reach that point.

The COURT.—The question the witness is entitled to answer is to explain why he omitted that statement of the other part of the addendum made by Mr. Manson on that report? [296]

The WITNESS.—You would have to look through the back of this, Mr. Barrett, to see it.

Mr. BARRETT.—You don't look through the back of the page that it is written on, do you?

A. No, but this was not the page that it was written on.

Mr. BLAKE.—Q. Mr. Aston, you are getting away from the question.

The COURT.—He is explaining the manner in

which it appears on a photograph of it. Of course, it appears backwards, and necessarily would.

Mr. BARRETT.—Unless the front of the page that it was on was photographed.

The COURT.—But they were photographing the other page.

The WITNESS.—This is the front of the page and this was written on the back of the page in Mr. Grunsky's (Mr. Bartell's) report.

Mr. BLAKE.—Q. The point Mr. Barrett wants to make, and I will help him make it, is this: why didn't your blue-printer when he turned over the page photograph the same page twice?

A. He would have to photograph every page twice in that case. Here is another page where there is nothing on the back. Here is another page. Here is another page. Anything written on the front in pencil you would have to turn it back and look through it. Nearly all the pages were the same where any writing was written on the back of them.

Q. Now, state why, in your consideration of this matter, you did not deem Mr. Manson's statement that the cost was prohibitive an essential matter?

A. Because I expected an inquiry and I fully intended to show that Mr. Manson's estimates were parted (padded), that they were not prepared on the same basis as the Hetch Hetchy, the unit costs were nearly double, some of the items were nearly treble what they ought to be. None of the Mokelumne reports were prepared on the same basis as the Freeman report—it gave my client's property a black eye by saying that it was more expensive than it ought to be.

The plaintiff further testified that the significance of the Railroad Flat diagram, contained in the Bartell report, lay in the fact that from it there would have been found, from Mr. Bartell's own data, 366 million gallons of water per day from the upper Mokelumne catchment of 430 square miles, if it had been submitted to the Army Board.

The taking of testimony closed on the 3d day of February, 1915. The foregoing constitutes all of the evidence with respect to the exceptions of the defendants hereinbefore noted.

Thereupon the cause was argued by counsel for the [297] respective parties, and the Court gave to the jury the following instructions:

[Instructions of Court to Jury.]

"Gentlemen of the jury: All that remains in this case now in order that it may be finally submitted to you is that the Court shall give you the principles of law that must govern you in your consideration of the evidence in the case for the purpose of reaching a verdict; if you will give me your attention for a few minutes I shall proceed and give you those instructions.

This is an action for damages alleged to have been suffered by plaintiff from the publication by defendants in a special Washington edition of the San Francisco 'Examiner' of an article regarding him which plaintiff alleges was a libel, and that the publication was actuated by malicious motives.

A libel of the character alleged is a false and unprivileged publication by writing or printing which exposes any person to hatred, contempt, ridicule, or

obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. The element requisite to make injurious language libelous is its falsity, since a publication, however injurious, is not a libel if it be true. It is not essential to constitute a libel that the publication be made with malice. A publication may be libelous, however innocently made, if it be false, the element of malice affecting only the measure of damages.

No one has a right to publish of or concerning another any false and unprivileged statement of a libelous character without rendering himself liable to the injured party for the damages resulting to him therefrom; and this applies to newspaper proprietors, editors or publishers equally with others. That is to say, newspapers as such have no peculiar privilege in that respect; and defamatory matter, although published in a [298] newspaper in good faith in the honest belief in its truth, if false, is not privileged because published as a mere matter of news. While the Constitution of the United States, and that of the State as well, guarantees the right of freedom of speech by the citizen and the liberty of the press, this guaranty is not intended to protect one against false and defamatory words uttered to the injury of another, nor the newspaper from responsibility for the publication in its columns of that which is false and defamatory and so libelous. The term 'Freedom of the press' consists in a right, in the conductor of a newspaper, to print what he chooses, without any previous license, but subject,

if unprivileged, to be held responsible therefor to the same extent that any one else would be responsible for the publication.

There is no claim in this case that the publication sued on if libelous was in any way privileged. A privileged publication is one which, so far as we are here concerned, is a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, and it is not contended that the article in question falls within that category; the defense of the defendant Examiner Printing Company, while admitting the making of the publication, being that the matters therein stated concerning the plaintiff were true; and that of the defendant William Randolph Hearst being that he was in no way responsible for the publication in question; that is, he denies all the allegations of the plaintiff's complaint tending to connect him with the publication complained of. Under these defenses, so far as the defendant Examiner Printing Company is concerned, it is not necessary for plaintiff to show that the article complained of [299] was published by it, since that fact is admitted, and the question to be first determined as to that defendant is whether the statements made in the article were true. If they were true, then that defendant is not responsible in damages; if they were not true, but were libelous, then the plaintiff will be entitled to a verdict for such damages as the jury may deem him entitled to under the principles I shall hereafter state to you as to the measure of their award. As to the defend-

ant William Randolph Hearst, the first question for the jury will be whether he made or was responsible for the publication of the article in question; and if you find that he either advised, directed, or instigated the publication, then he is responsible for it the same as if he himself had made it. If you find him responsible for the publication, then the question will be, as with the other defendant, whether the statements published were true. If they were true, there is no ground of recovery; if they were false, then, as with the other defendant, he would be responsible for such damages as the jury may award against him. Whether he is responsible for the publication may be made to appear either by direct evidence of the fact or by circumstances warranting the inference of such fact. As to both defendants, the burden is upon the plaintiff to make out this case entitling him to recover by a preponderance of the evidence, that is, by evidence which satisfies the jury that to some extent it is stronger and more satisfactory as a basis of their verdict than that which is opposed to it.

The publication or article sued on has been read to the jury and they are acquainted with its contents so that I need not here repeat them.

The plaintiff, by innuendoes in his complaint—and [300] the term 'innuendoes' is meant here in its technical sense to designate a feature of the pleading—has assigned a meaning to certain sentences or phrases in the alleged libelous statements. Where the words employed may be understood in more than one sense, it is the office of an innuendo to

designate that meaning which the plaintiff proposes to establish as the meaning intended by the defendant or understood by those who read them. An innuendo, however, can neither add to nor change the natural meaning of the alleged libelous words. The jury are the judges of whether or not the meaning of the libelous words is that assigned in the plaintiff's complaint.

If you find, under the principles I have stated to you, that the publication complained of was a libel upon plaintiff, there are two classes of damages which may be awarded—compensatory and exemplary. If it was made without malice, then plaintiff will be entitled to compensatory damages only, and you should award him as damages an amount which will justly compensate him for all the detriment and injury, if any, proximately caused him by the publication of the libel. In considering what amount will so compensate him, you may consider the nature of the imputation of the libel, the extent of the publicity given to it, the circulation of the paper in which the libel was printed at the time of the publication of the libel, any special facts or features which would distinguish the paper in which it was published from an ordinary issue of a newspaper in the way of asssigning to or giving it a permanent value and a continuing interest, if any, which would cause, or be likely to cause, copies of it to be preserved by those into whose possession it may have come, the influence of the paper and of the defendants, and all the natural and necessary [301] consequences of such a publication upon the plaintiff,

including injuries to his feelings, and loss of reputation, shame, or mortification, if any. The plaintiff is not required to show any special damage resulting to him. If the jury find he has been libeled, the question as to what damages they will award rests in their sound discretion.

If you find that the publication complained of was libelous, and that it was made with actual malice, you may, in your discretion, in addition to the compensatory damages I have indicated, that is, those designed to be a reparation for the injury suffered from the wrongful act, award the plaintiff exemplary damages, that is, damages designed as a punishment for the improper motive that actuated the wrongful act. Where the libel is established, a plaintiff is entitled as of right to compensatory damages; but the award of exemplary or punitive damages is wholly within the discretion of the jury and is not a matter of right.

By actual malice, or malice in fact, is meant the existence of personal hatred, ill-will, or a desire to injure on the part of the one committing the wrong. An essential element to be proven in actions of this character in order to show actual malice is that the person or persons publishing the libel either knew that the matter asserted was false or else published it in conscious disregard of whether it was true or false. Evidence of actual malice may be direct, that is, by showing acts, declarations, or conduct of the parties charged evidencing personal hatred, ill-will, or a desire to injure the complaining party; or may be indirect, that is, by showing circumstances in con-

nection with the conduct of those charged toward the complaining party from which may be directly and [302] logically inferred a wanton, willful, reckless, or heedless disregard of the rights of the latter. Actual malice, or malice in fact, is never presumed, but must be proved like any other fact in the case either directly or inferentially in the manner I have heretofore stated to you. In this regard you are to understand that the mere fact that a publication is shown to be false, and so libelous, does not alone make it malicious.

When the other elements I have indicated to you have been proven, malice on the part of a corporation may be inferred where the act of its agent is done with actual malice in the course of his employment in the business of the corporation, and is adopted or ratafied by it. Such ratification may be inferred by a failure to repudiate the act of the employee upon the fact coming to its knowledge.

Before exemplary damages may be assessed against the proprietor of a newspaper for a libel published therein, it must be shown that the proprietor personally was actuated by malice either in authorizing its publication or in ratifying it after it had been informed of its publication; otherwse the malice of a reporter or editor in publishing libelous matter cannot be imputed to the proprietor nor render him liable to exemplary damages. If the proprietor conducts his paper as a reasonably prudent man would conduct it, and takes such precautions to prevent the publication of libelous articles which an ordinarily prudent man under like circum-

stances would take, exemplary damages cannot be assessed against him for a libel published in his paper if he had no personal knowledge of the publication at the time it was made, and had not, either by general or particular instructions, authorized the publication, or did not, after the publication, ratify it when knowledge of [303] it was brought to his attention.

In addition to justifying the charges complained of and alleging them to be true, the defendant Examiner Printing Company has alleged certain matters by way of mitigation of damages. Such matters are to be considered by you on the question whether that defendant, in the publications complained of, was actuated by malice.

A defendant has a legal right to justify an alleged libelous article in his answer and to allege that the statements contained therein are true, provided that he does so in good faith and with a bona fide and reasonable expectation of proving that such statements are true; and in such event the filing of such an answer would not be evidence of malice, even though the charges prove false upon the trial; but if such republication or repetition of the alleged libel in the answer is found my the jury not to have been made in good faith and with a bona fide and reasonable expectation of proving the matters asserted to be true, such republication may be considered by the jury in determining whether the libel was originally published with actual malice.

If you find that the defendant, Examiner Printing Company, at the time of the publications complained

of believed that the charges contained in such publications were true, and that it had reasonable cause for believing such charges to be true, and further find that such belief was the result of investigation from reliable sources such as a reasonable man would make, and that it published said articles believing them to be true, in such event you should exonerate that defendant from malice and award only compensatory damages against it.

Should you find that one of the defendants was actuated [304] by malice in the publication of the articles complained of but that the other defendant was not actuated by malice therein, you may, in your discretion, assess exemplary damages against the defendant whom you find was so actuated by malice, but you cannot assess that class of damages against the defendant found not actuated by such malice.

In the determination of all of the questions submitted to you, you must be guided by the evidence alone, and the legitimate inferences therefrom. You cannot find against the defendants or either of them on mere suspicion or conjecture.

Now, gentlemen of the jury, those are the specific suggestions as to the law governing the rights of these parties which it is deemed necessary to submit to you. There are certain general considerations, however, which I shall state to you and with which perhaps you are familiar.

The question of what the facts are, as deduced from the evidence in the case, is one wholly and alone for the jury; with that the Court has nothing

to do; the Court states to you the law and you must apply to law to the evidence in determining what your conclusion will be from the evidence. But you find the facts; the Court is neither privileged nor disposed in any wise to trench upon that function of the jury.

You are likewise the judges of the credibility of the witnesses. Witnesses appear upon the witness-stand and are sworn; they are presumed to speak the truth; that does not mean that they always will speak the truth; it means that unless there is something appearing which is sufficient in your judgment to induce you to believe that they have not spoken truly you should believe them; you are to observe the demeanor of a witness upon the stand, whether his evidence appears to be in **[305]** accord with principles of honesty and actuated by a desire to tell the truth, how far it accords with the other evidence in the case, how far it is at variance with the other evidence in the case which you are inclined to believe and in that way you make up your minds as to the degree of belief you will accord to any witness coming upon the stand. The mere positiveness of a witness in his declarations has necessarily nothing to do with the degree of credit that you are called upon to accord him; you are to judge his evidence by those manifestations which in connection with all the other evidence in the case to your mind tend to establish whether he has told the truth or otherwise. In that way you determine what the facts are in the case.

The form of verdict in the case is usually prepared

by the clerk. In this case you will have submitted to you three forms in view of the instructions I have given to you. Should you find in favor of the defendants there is a form of verdict here to indicate that. Should you find a verdict in favor of the plaintiff and against one of the defendants, and not be satisfied that the evidence warrants a verdict against the other defendant, you will simply say, 'We the jury find in favor of the plaintiff as against the defendant—naming the defedant—for so and so much damages.' That will imply that you find a verdict in favor of the other defendant; in other words, you do not find against the other defendant. If you find that the plaintiff is entitled to a verdict as against both defendants but you should find that one of them was actuated by malice in the publication and that the other one was not then you will give your verdict in terms which you will find here, making a finding that the plaintiff is entitled to compensatory damages against the two defendants and exemplary [306] damages against one defendant. The form you will find here will meet that necessity. That is in view of the charge that I gave you that if you find that one defendant was actuated by malice you will find exemplary damages against that defendant but you could not find exemplary damages against the other defendant if you find it was not actuated by malice.

You will understand that in the federal courts the verdict of the jury must be unanimous."

Thereupon the jury retired and deliberated and returned a verdict in favor of the plaintiff in the sum

of $2,800., and upon said verdict judgment was entered against said defendants and in favor of the plaintiff in said sum and for costs amounting to $395.15.

Thereafter, within the time allowed by law and a previous stipulation of the defendants, the time for the serving of the defendant's draft of their proposed Bill of Exceptions upon the plaintiff was extended to and including the 16th day of March, 1915, by order of court duly made and filed on February 24, 1915.

Thereafter, on the 27th day of February, 1915, and within the term at which said cause was tried and in which the judgment in said action was rendered, the above-entitled court duly gave and made and there was filed an order continuing and permitting the settlement and signing of defendants' Bill of Exceptions during the next succeeding term of court.

Thereafter, on the 16th day of March, 1915, and within the time allowed by stipulation and order of Court, the time for serving defendants' draft of their proposed Bill of Exceptions was further extended to and including the 19th day of March, 1915, **[307]** by stipulation and order of court duly made and filed on March 16, 1915.

Thereafter and on the 19th day of March, 1915, within the time allowed by law and stipulations of the plaintiff and the order of the Court theretofore made, the defendants served upon the plaintiff their proposed Bill of Exceptions, dated March 19, 1915.

Wherefore, defendants present the foregoing as

their Bill of Exceptions in this cause, and pray that the same may be settled and allowed and signed and certified as provided by law.

Dated March 19, 1915.

GARRET W. McENERNEY,
Attorney for Defendants.

[Stipulation Relative to Bill of Exceptions.]

IT IS HEREBY STIPULATED by the parties hereto that within the time allowed by law and a stipulation of the defendants, to wit, on April 1, 1915, the plaintiff served upon the defendants their proposed amendments to defendants' proposed Bill of Exceptions, and later, on April 6, 1915, and within the time allowed by law and the stipulation of the plaintiff, the defendants delivered their proposed Bill of Exceptions together with plaintiff's proposed amendments thereto, to the clerk of the above-entitled court for the Judge who tried said action, and that thereafter and on the 8th day of July, 1915, (no time having been designated by the said Judge for the settlement of said Bill of Exceptions) the above-entitled court duly made and gave and there was filed its order continuing the time for the settlement of said Bill of Exceptions to and including the 12th day of July, 1915, and **[308]** continuing and permititng the settlement and signing of said Bill of Exceptions during the term of court succeeding the term in which said order was made.

Thereafter, by the order of Court, dated July 12, 1915, the time for the settlement of said Bill of Exceptions was continued thirty days from said 12th day of July, 1915; thereafter, by order of Court

dated August 7, 1915, the time for the settlement of said Bill of Exceptions was continued fifteen days from said 7th day of August, 1915, thereafter by order of Court dated Aug. 21, 1915, the time for the settlement of said Bill of Exceptions was continued fifteen days from said 21st day of August, 1915, and thereafter, by order of Court, dated September 4, 1915, the time for the settlement of said Bill of Exceptions was continued fifteen days from said 4th day of September, 1915.

IT IS FURTHER STIPULATED that the foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated September 13th, 1915.

JACOB M. BLAKE,
Attorney for Plaintiff,
GARRET W. McENERNEY,
Attorney for Defendants.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions is hereby settled and allowed.

Dated September 13th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sept. 13, 1915. Walter B. Maling, Clerk. **[309]**

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Petition for Writ of Error.

To the Honorable, the District Court of the United States in and for the Northern District of California (Second Division):

EXAMINER PRINTING COMPANY, a corporation, and WILLIAM RANDOLPH HEARST, the defendants in the above-entitled action, feeling themselves aggrieved by the verdict of the jury and the judgment thereupon entered in favor of the plaintiff in said cause on the 4th day of February, 1915, whereby it was adjudged that the plaintiff recover of and from the defendants the sum of Two Thousand Eight Hundred Dollars ($2800) and his costs, taxed at the sum of Three Hundred and Ninety-eight and 25/100 Dollars ($398.25), come now by Garret W. McEnerney, Esq., their attorney, and jointly and severally petition said Court for an order allowing them to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that be-

half made and provided; and in this behalf allege that in said judgment and in the proceedings had prior thereto in said action certain errors were committed to the prejudice of these defendants, all of which will appear more in detail from the assignment of errors which is filed with this petition. **[310]**

WHEREFORE, these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order may be made by this Court fixing the amount of security which said defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated June 14th, 1915.

EXAMINER PRINTING COMPANY, a Corporation, and
WILLIAM RANDOLPH HEARST,
By GARRET W. McENERNEY,
Their Attorney. **[311]**

[Endorsed]: Filed June 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[312]**

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Assignment of Errors.

Now come the EXAMINER PRINTING COMPANY, a corporation, and WILLIAM RANDOLPH HEARST, defendants in the above-entitled action, by Garret W. McEnerney, Esq., their attorney, and specify the following as the errors upon which they will rely upon their prosecution of the writ of error in the above-entitled cause:

I.

That the District Court of the United States for the Northern District of California, Second Division, erred in denying the motions of said defendants to suppress the depositions of George A. McCarthy, William J. Wilsey and Robert Underwood Johnson, which said depositions were subsequently read in evidence by the plaintiff.

BEING EXCEPTION NO. 1.

II.

That the said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the

witness Eugene J. Sullivan:

"Q. In your appearance before the Public Lands Committee, did you report to them that it would take the entire Mokelumne supply—that the so-called Bartell suppressed report took [313] in the entire Mokelumne catchment as a source of supply to the City of San Francisco and not your property singly?"

To which question the witness answered: "I did."

BEING EXCEPTION NO. 2.

III.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

"Mr. BLAKE.—Q. Mr. Sullivan, how much, as near as you can recollect, have you expended on the company's water properties, in construction and in other works and matters, in order to maintain your company's and the bondholders' water rights and other rights since you became president of the company in 1910?"

To which the witness answered: "About $100,000."

BEING EXCEPTION NO. 3.

IV.

The said Court erred in overruling the objection of counsel for said defendants in the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

"Q. Was it necessary to obtain such moneys from time to time in order that the company's water rights and properties be maintained for

the benefit of the bondholders and stockholders of the Sierra Blue Lakes Water & Power Company of which you were the president?"

To which the witness answered: "It was."

BEING EXCEPTION NO. 4.

V.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

"Q. Did you consider them to be of such value that you would feel justified in paying heavy interest or making heavy sacrifices in order that you should obtain money necessary to obtain such rights and properties for your company and on behalf of your bondholders?"

[314]

To which the witness answered: "Yes, sir."

BEING EXCEPTION NO. 5.

VI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

"Q. I will ask you, Mr. Sullivan, whether or not during the time since you became president of the company, you have had outstanding any options for the purchase, whether you have given any options for the purchase of your properties upon which a considerable consideration was paid down?"

To which the witness answered: "Yes, sir."

BEING EXCEPTION NO. 6.

VII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

> "Q. Mr. Sullivan, state to the jury whether in your first contact with the city in offering the Sierra Blue Lakes Water & Power Company's properties for a water supply you went to them in the interest of the company or the city came to you in the interest of the city?"

To which the witness answered:

> "The city engineer in October, 1910, sent a communication to the company, and in that communication he asked at what price this property could be obtained by the city."

BEING EXCEPTION NO. 7.

VIII.

The said Court erred in overruling the objection of counsel for said defendants to the introduction in evidence of Plaintiff's Exhibits Nos. 14 and 15, and in admitting said exhibits in evidence. Exhibit No. 14 purports to be a letter from Marsden Manson, City Engineer, to A. F. Martel, asking the latter for a statement of the price for which he would sell to [315] the city the rights of his company upon the Mokelumne River, together with a statement as to the nature and extent of those rights. Exhibit No. 15 purports to be a letter from Eugene J. Sullivan to Marsden Manson in answer to Exhibit No. 14.

BEING EXCEPTION NO. 8.

IX.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

"Q. What was that statement, Mr. Sullivan?"

To which the witness answered:

"He said to the audience that there was a report made by an assistant city engineer named Max J. Bartell, on the Mokelumne River, upper catchment, in which that report said that the Mokelumne River water shed would supply 400 and some odd—He stated that there was a report suppressed from the Advisory Board of Engineers, on the water supply."

BEING EXCEPTION NO. 9.

X.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness Eugene J. Sullivan:

"Q. I will ask you to state whether or not Mr. O'Shaughnessy took any notice of the statements made by Mr. Aston and made any reply thereto, any public reply thereto?"

To which the witness answered: "He did."

BEING EXCEPTION NO. 10.

XI.

The said Court erred in overruling the objection of counsel for said defendants to the following ques-

tion asked by counsel for plaintiff of the witness Eugene J. Sullivan:

> "Q. So far as you can recall, what was his answer to the statement that there was such a report [316] as Mr. Aston stated to be in existence?"

To which the witness answered:

> "He said that Mr. Max J. Bartell was merely one of one hundred and fifty assistance."

BEING EXCEPTION NO. 11.

XII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 2. State whether or not in or about May 1913, you employed the plaintiff, Taggart Aston, to make an engineering report upon an hydro-electric and irrigation project in California."

To which the witness answered: "I did."

BEING EXCEPTION NO. 12.

XIII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

> "Q. 3. If you answer the last interrogatory in the affirmative, state in connection with what particular project or property you employed Mr. Aston to make such a report."

To which the witness answered:

"Known in California as the Sierra Blue Lakes Water & Power Company."

BEING EXCEPTION NO. 13.

XIV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 4. If you state that the project upon which said report was to be made was that connected with the Sierra Blue Lakes Water and Power Company's properties on the Mokelumne River in California, state whether or not these properties are also known [317] as "The Sullivan Properties," and whether or not they are the property of a company of which Mr. Eugene J. Sullivan was at that time the president."

To which the witness answered:

"Yes, they are the same properties."

BEING EXCEPTION NO. 14.

XV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 5. State whether or not the report made by Mr. Aston pursuant to his employment by you, was in writing; also whether or not he made more than one such report to you in connection with these properties."

To which the witness answered:

"Yes, he made a supplemental report later which I asked him to make."

BEING EXCEPTION NO. 15.

XVI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 7. State whether said report or reports were obtained by you, or were ever used by you, for the purpose of selling the so-called Sullivan properties on the Mokelumne River in California, to the City of San Francisco."

To which the witness answered:

"No, I never offered anything to the city of San Francisco.

BEING EXCEPTION NO. 16.

XVII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William C. Wilsey: [318]

"Q 8. State whether or not said report or reports were obtained by you for use exclusively in offering said properties for sale in Europe."

To which the witness answered: "They were."

BEING EXCEPTION NO. 17.

XVIII.

The said Court erred in overruling the objection of counsel for said defendants *to* the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 9. If your answer to the last interrogatory is in the affirmative, state whether or not you offered said properties for sale in Europe."

To which the witness answered:

"I did. I offered the properties for sale in Europe."

BEING EXCEPTION NO. 18.

XIX.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 10. If you answer the foregoing interrogatory in the affirmative, state whether or not Mr. Aston had an interest, contingent or otherwise, in any sale that you might make of said properties in Europe."

To which the witness answered:

"No understanding whatever with Mr. Aston as to any commission, but I certainly intended to give him fair commission out of any work I done; but there is no written proposition of any kind. In fact, he never asked any questions."

BEING EXCEPTION NO. 19.

XX.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

Q. 12. If you answer the last interrogatory in the affirmative, state whether or not you notified [319] Mr. Aston as to any particular

use or purpose for which said properties were desired by said parties in Europe, if in fact any particular use or purpose was specified."

To which the witness answered:

"Yes, I told him what we were figuring on using the properties for, and the purposes were hydro-electric and irrigation."

BEING EXCEPTION NO. 20.

XXI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 17. Have you in your possession any writing purporting to be an original offer addressed to Mr. Aston by Eugene J. Sullivan, as President of the Sierra Blue Lakes Water & Power Company, to sell the properties hereinbefore referred to, which said offer is dated March 10th, 1913. If so please attach the same to your answers hereto, marked as one of the Plaintiff's Exhibits."

To which the witness answered:

"Yes, I have an offer, but as to the date mentioned I am not prepared to say until I see the original paper."

BEING EXCEPTION NO. 21.

XXII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world, meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this country and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer."

To which the witness answered: "Yes, I do."

BEING EXCEPTION NO. 22. **[320]**

XXIII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William J. Wilsey:

"Q. 20. State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid."

To which the witness answered:

"From all the information that I have been able to secure regarding Mr. Aston, both in America and in Europe, his reputation has been high-class."

BEING EXCEPTION NO. 23.

XXIV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Richard Harte Keatinge:

"Q. Well, make a fair statement of the na-

ture of your relations with Mr. Aston at that time, from which the jury can draw the conclusion with reference to these properties and to any report which you know he made upon those properties at that time."

To which the witness answered:

"Mr. Wilsey employed Mr. Aston to make this report—Mr. W. J. Wilsey of Portland. We paid half the expense of making the investigation, but I do not believe that Mr. Aston was ever in our employ. I don't know whether legally he was ever in our employ. We paid half the expense and Mr. Wilsey paid the other half of the expense, but he was Mr. Wilsey's man, I should say."

BEING EXCEPTION NO. 24.

XXV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Clement H. Miller:

"Q I will ask you to state whether or not you have any recollection of Mr. Aston making a statement of what his connection was with [321] reference to having disclosed certain facts and conditions surrounding the suppression of the so-called Bartell-Manson engineering report of the city at that meeting at that time and place."

To which the witness answered:

"Mr. Aston read quite a lengthy statement from manuscript, and I have a general recollection of the main points that were covered in

that statement. It was particularly relating to that suppressed report."

BEING EXCEPTION NO. 25.

XXVI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintff of the witness George A. McCarthy:

"Q. If you answer the foregoing interrogatory in the affirmative, state whom you saw in connection with the object of your errand, and what was said and done between you upon that occasion in connection with said suppressed report."

To which the witness answered:

"I saw Mr. Bartell and made known the object of my visit, which was to obtain use of, if possible, the report and documents which had been returned to his office, or if they could not be removed from the office, to make certain extracts from them. Mr Bartell produced a copy of the report and examined it in my presence, but would not allow me to again have possession of it nor to make any extracts from it."

BEING EXCEPTION NO. 26.

XXVII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness George A. McCarthy:

"Q. If you answer the foregoing interrogatory in the affirmative, state who were present

at such conversation or conversations, where they were held; and what was said or done there, with reference to said report. Did you see the original [322] of said report then and there in the possession of Mr. Bartell?"

To which the witness answered:

"The only conversation I had with Mr. Bartell regarding the report was on the occasion of my visit to his office in June, when I again endeavored to obtain the document for purposes of reference. No person was present except Mr. Bartell, and he refused to allow the document to again go out of his office or to allow any extracts to be made from it. Mr. Bartell produced the copy of the report, but to the best of my knowledge it was not the copy we had in the office of Mr. Taggart Aston. The original contained many marginal notes in pencil which the copy produced by Mr. Bartell did not contain, to the best of my knowledge."

BEING EXCEPTION NO. 27.

XXVIII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness George A. McCarthy:

"Q. State whether or not said Bartell-Manson report, together with the maps, plats, diagrams and plans therein referred to or therein attached, showed upon its face that it was prepared by a competent, skilful and conscientious member of the engineering profession."

To which the witness answered:

"The report with the plats and diagrams showed that it had been very carefully prepared."

BEING EXCEPTION NO. 28.

XXIX.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness George A. McCarthy:

"Q. State whether or not, if you know, the information and data shown thereby was sufficiently full, complete, and in sufficient detail, to comply, from an engineering standpoint, with the requirement placed upon the City of San Francisco by the Secretary of the Interior of the United [323] States of America, that it, the said city should proceed, at its own cost and expense and with due diligence, to secure data upon which to make the determination mentioned in Interrogatory No. 20."

To which the witness answered: "I believe it was."

BEING EXCEPTION NO. 29.

XXX.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Stanley Behneman:

"Q. Will you state in your own way the facts and circumstances in connection with that episode?"

To which the witness answered:

"It was shortly before one o'clock. This gentleman I did not know at the time when he entered the door; he made certain demands—he said he was from the engineering department of the City of San Francisco and he wished to have certain records and plans which Mr. Aston had taken. I don't know under what condition they were taken. He wanted them right away, or he would have a warrant issued for them. He appeared to be very excited. He wanted to know when Mr. Aston would return. I told him I did not know. He said he would wait a while. He did wait quite a while and then he decided to go and he said that these documents must be back by one o'clock."

BEING EXCEPTION NO. 30.

XXXI.

The said Court erred in overruling, the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Taggart Aston:

"Q. I will ask you now to state what considerations moved you to make any communications which you may have made to members of Congress in relation to this report?"

To which the witness answered:

"My main reason, although I had several reasons, was the fact that I had received from Mr. Wilsey copies of I think two letters from gentlemen, one in London and another in Paris, in which they said that they had heard—they were

connected, [324] they were Mr. Wilsey's associates who were going to endeavor to finance this proposition and were therefore greatly interested—in which they said that a Mr. Freeman had made a report and that they both intended writing to Mr. Freeman, and they were anxious to see his report, so that they would get information from that source as well as from my report. Now, upon an examination of the Freeman report, I found that Mr. Freeman, not only in his own report, but in his discussion of other reports—both in discussion and in extracts from other reports which were included in his main report, had grossly misrepresented the Mokelumne supply to such an extent that it would have been quite impossible for us to have financed our project in France, particularly when such an eminent gentleman as Mr. Freeman, and who was so well known in Europe, had made statements that there was not the supply that I in my report had claimed. I concluded that Mr. Freeman, being an eminent engineer and myself only a comparatively obscure engineer, I concluded that his report would be given much greater weight than mine. I knew from my own surveys, as well as from the suppressed report, as well as from conclusions of Mr. Manson, that this supply was sufficient and that there was the water there. I therefore came to the conclusion that in duty to my clients these misrepresentations had to be removed and that the Freeman report had done my clients very grave injustice."

BEING EXCEPTION NO. 31.

XXXII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Taggart Aston:

"Q. Now, I will ask you, Mr. Aston, to state briefly what you may have done in calling upon the city, as is stated here in this letter, in company with Mr. Hart and Mr. Burleson, and state whether or not you were then shown a copy of the so-called Bartell-Manson report with the essential statement referred to in your letter here?"

To which the witness answered:

"On account of my assistant, Mr. McCarthy, having informed me that he had noticed in the copy shown to him by Mr. Bartell that this essential statement, which of course was the whole gist of this report which had affected me in communicating with Washington—on account of Mr. McCarthy having told me that he had not seen this essential statement in the copy which Mr. Bartell showed to him, I informed [325] the president of the board of health, Mr. Barendt, who called at my office,—I had never known him before, I informed him that I believe that the city was now showing a copy which they purported to be this report, in which they had eliminated this very essential statement made by Mr. Manson, the city engineer, Mr. Barendt, on the 8th day of July, went up to Mr.

Judell, his fellow-official. By reason of what was told me by Mr. Barendt on his return, I requested Mr. Barendt to go back with me to Mr. Judell in order that I could further investigate what Mr. Barendt had told me regarding it, which coincided with what Mr. Bartell had told me. Mr. Judell had shown Mr. Barendt this report. I went with Mr. Barendt to Mr. Judell's office. Mr. Barendt introduced me to Mr. Judell. Mr. Judell was the president of the board of works. He was at the head of all the engineering department. As the chief official, responsible for the city, I told Mr. Judell that I would like to see this report, as I wished, if I found this elimination had been made, I wished to make the charge that the elimination had been made. I asked Mr. Judell would he kindly do as he had done with Mr. Barendt, show me that report as the chief of the public works department and chief of the engineers' department. Mr. Judell said, "I will not show you that report, because we are not going to help the enemies of Hetch Hetchy." Then I asked Mr. Judell would the engineering department show it to me. He said he could not speak for the engineering department. . . . On account of that, I asked Mr. Barendt to come up with me to the engineering department. Mr. Barendt said, "this will get me in bad with the department if I pursue this matter any further."

BEING EXCEPTION NO. 32.

XXXIII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Taggart Aston:

"Q. State whether or not you had occasion to make any public statements with reference to the matter of this report and of your interest in disclosing the fact of it on November 5, 1913, before the Civic Center meeting at the St. Francis?"

To which the witness answered:

"I had asked Mr. O'Shaughnessy to give me ten or fifteen minutes to look into the Mokelumne matter, and I told him that I thought that after he had heard and seen my data on it I was sure that he would personally remove the misrepresentations [326] made regarding it in the previous report. This was in a conversation over the 'phone. It was either the day before or two days before the Civic Center meeting. Mr. O'Shaughnessy replied very sharply that he was too busy, he would give me no time. As this was the first public meeting at which anyone had an opportunity to remove certain exceptins that had been planted in the people's mind by the fact of the newspapers not publishing anything but one side of the matter, I therefore decided that it was the proper opportunity for me to tell the public my view of the question, espeially as the 'Examiner' and others had re-

ferred to me as Mr. Sullivan's engineer and had connected me with him in the matter, and in a manner that I did not approve of. I therefore wrote out a speech which I delivered at the meeting. It was a meeting at which both sides were heard, and at which discussion was had on the various papers. I therefore wrote out a speech and delivered that speech. I afterwards had it printed and sent it to each of the senators before this libel was published. I have an acknowledgment from senators in regard to having received the printed document which is a true copy of the written-out speech that I had made at the time."

BEING EXCEPTION NO. 33.

XXXIV.

The said Court erred in overruling the objection of counsel for said defendants to and in admitting in evidence a copy of the San Fracisco Examiner of Thursday, November 6, 1913, purporting to give an account of the proceedngs of the Civic Center meeting of November 5, 1913, and what was said and done by the various speakers of said meeting.

BEING EXCEPTION NO. 34.

XXXV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Taggart Aston:

"Q. Did you make any statement at that time and place with reference to the fact that this

supply from the Mokelumne had been discriminated against in various city reports?"

To which the witness answered—"Yes, sir." **[327]**

BEING EXCEPTION No. 35.

XXXVI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Taggart Aston:

"Q. State in what points you made the statement that the supply had been discriminated against."

To which the witness answered:

"I stated that the city's reports had been biased in that they made unfair comparisons, they minimized our sources, supplies and estimates of our sources, and exaggerated the estimates of other sources and thus made a false and unfair comparison with the Hetch Hetchy project. In particular, I mentioned one instance where in Mr. Freeman's report, in a very essential item, the item of concrete in the Hetch Hetchy dam as compared with the Mokelumne dams, he priced the Mokelumne dam—"

BEING EXCEPTION NO. 36.

XXXVII.

The said Court erred in overruling the objection of counsel for said defendants and in admitting in evidence a copy of the San Francisco "Examiner" of November 30, 1913, purporting to contain a statement respecting the proposed Washington edition

of said San Francisco "Examiner," about to be published.

BEING EXCEPTION NO. 37.

XXXVIII.

The said Court erred in overruling the objection of counsel for said defendant William Randolph Hearst and in admitting the evidence over the objection of said defendant the exhibit mentioned in the last preceding assignment of error.

BEING EXCEPTION NO. 38. [328]

XXXIX.

The said Court erred in denying the motion of counsel for said defendants to strike out the testimony of witness Thomas R. Marshall with respect to a conversation between the witness and John Temple Graves concerning the Hetch Hetchy bill, and the request of Mr. Graves that the witness give him a written statement to the effect that the witness would vote for the Hetch Hetchy Bill if the matter came up to him.

BEING EXCEPTION NO. 39.

XL.

The said Court erred in overruling the objection of counsel for said defendants to and in admitting in evidence an article in the San Francisco "Examiner" of December 1st, 1913, purporting to be a newspaper dispatch under the headline "Marshall for Hetch Hetchy. Vice-president will cast vote for water bill if necessary. Gives views to the 'Examiner.' Writes for special edition that it to be printed in Washington." Said dispatch contained a purported statement from Hon. Thomas R.

Marshall, Vice-president of the United States, giving his reasons for supporting the Hetch Hetchy Bill.

BEING EXCEPTION NO. 40.

XLI.

The said Court erred in overruling the objection of counsel for said defendants and admitting in evidence the matter in the article of the San Francisco "Examiner" of December 1st, 1913, immediately following the purported dispatch referred to in the last preceding assignment of error, which succeeding matter purports to be a statement concerning the proposed Washington edition of the San Francisco "Examiner" and the manner in which it would be distributed.

BEING EXCEPTION NO. 41. [329]

XLII.

The said Court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the "Arizona Gazette," a newspaper of July 7, 1913, purporting to contain a Washington dispatch under the heading "Hetch Hetchy Chicanery," and stating that Eugene J. Sullivan of San Francisco had before the House Public Lands Committee made charges of chicanery suppression of report and political bias of the engineers in the interest of the Hetch Hetchy project for supplying San Francisco with water.

BEING EXCEPTION NO. 42.

XLIII.

The said Court erred in overruling the objection of counsel for said defendants to and admitting in

evidence a copy of the "Evening World-Herald" newspaper of Omaha. Nebraska, dated July 7, 1913, containing an article under the heading "Alleges crookedness in Hetch Hetchy plan," and which said article was practically identical with the article referred to in the last preceding assignment of error.

BEING EXCEPTION NO. 43.

XLIV.

The said Court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the "Herald Republican" newspaper of Salt Lake City, Utah, dated July 8, 1913, containing an article headed "Charges Chicanery in Hetch Hetchy Project," which said article was practically identical with the article referred to in the last perceding assignment of error.

BEING EXCEPTION NO. 44. **[330]**

XLV.

The said Court erred in overruling the obection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Robert Underwood Johnson:

> "Q. 8. Will you please state whether or not on the occasion hereinbefore referred to before the Committee on Public Lands in the United States Senate, you spoke of Mr. Aston as 'Sullivan's man Aston,' or whether or nor you spoke of Mr. Aston in connection with any Mr. Sullivan upon that occasion."

To which the witness answered:

> "I never spoke of Mr. Aston as 'Sullivan's man Aston,' nor in connection with Sullivan

except as appears in the foregoing statement, Mr. Sullivan being under consideration by the Committee."

BEING EXCEPTION NO. 45.

XLVI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness Robert Underwood Johnson:

"Q. 9. Also, please state if upon the occasion last referred to, you characterized any thing or matter, on the authority of Mr. Aston, as 'a bad jobbery.' "

To which the witness answered: "I never did."

BEING EXCEPTION NO. 46.

XLVII.

The said Court erred in overruling the objections of counsel for said defendants to and admitting in evidence Plaintiff's Exhibit No. 44, purporting to be certified copies of certificates filed with the post-office authorities for the purpose of showing the proprietorship and ownership of the San Francisco "Examiner" of San Francisco, California, the Los Angeles "Examiner" of Los Angeles, California, the Atlanta "Georgian" of Atlanta, Georgia, the Chicago "Evening American" of Chicago, Illinois, the Boston [331] "American," of Boston, Mass., and the New York "Evening Journal" of New York, N. Y. Said certificates purport to show that all of the papers referred to are published by corporations with the exception of the Los Angeles "Examiner," which is published by William Randolph Hearst,

and that said William Randolph Hearst is the only person named as owner of stock of the corporations owning the other papers mentioned.

BEING EXCEPTION NO. 47.

XLVIII.

The said Court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky.

> "Q. With reference to your employment at or about this time to furnish a report of the run-off from Alameda Creek proper of the Spring Valley Water Company, that report of yours was turned in when?"

To which the witness answered:

> "The statement I made this morning with reference to turning in everything to the Army Board related to the matter that bore upon the report that was then under discussion."

BEING EXCEPTION NO. 48.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Do you know what became of that report of yours that you turned in? Did it go to the Army Board?"

To which the witness answered:

> "The report was delivered very late. I don't remember the date. I haven't had occasion to look at it for a long time. I think that was delivered some time in October or November."

BEING EXCEPTION NO. 49. [332]

L.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

"Q. Were your conclusions upon that investigation favorable or unfavorable to the Spring Valley Water Company's contention?"

To which the witness answered:

"I cannot say as to whether it was favorable or unfavorable to the city or to the Spring Valley Water Company. The finding with reference to the quantity of water flowing in Alameda Creek was not at great variance with what was claimed by the Spring Valley Water Company."

BEING EXCEPTION No. 50.

LI.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William F. Bade:

"Q. And Mr. Freeman was there in the representative capacity of furnishing or accounting for the furnishing of data which the Secretary had called for under the order of the continuance, the show cause order?"

To which the witness answered:

"Mr. Freeman expressly stated he was representing the city officials, and Mr. Fisher so accepted it."

BEING EXCEPTION NO. 51.

LII.

The said Court erred in overruling the objection of counsel for said defendants to the following questions asked by counsel for the plaintiff of the witness William F. Bade:

> "Q. State whether or not anything came out at that hearing with reference to any suppressed report which had not been furnished up to the date of that hearing." [333]

To which the witness answered: "Yes, sir."

BEING EXCEPTION NO. 52.

LIII.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William F. Bade:

> "Q. State what if anything appeared at this hearing as coming from the city, or the representative of the City of San Francisco, which showed that there was in existence a report with reference to any available water supply to San Francisco which had not reached the Army Board or the Secretary of the Interior up to that time."

To which the witness answered:

> "On the complaint of Mr. McCutcheon to Secretary Fisher that the Marks-Grunsky-Hyde report, that they had never been permitted access to it although repeated requests had been made; upon that presentation by Mr. McCutcheon Secretary Fisher asked for that

report, if there was such a report—asked Mr. Freeman, representing the city. Mr. Freeman then produced the report and said it was the only copy he had, and turned it over to Secretary Fisher, and he to the Advisory Army Board who also stated that they had not had access to it."

BEING EXCEPTION NO. 53.

LIV.

The said Court erred in overruling the objection of counsel for said defendants to the following question asked by counsel for the plaintiff of the witness William F. Bade:

"Q. What did Mr. Freeman say?"

To which the witness answered:

"Mr. Freeman then handed over the report and said it was the only copy he had, but he was willing to turn it over to Secretary Fisher and the Army Board."

BEING EXCEPTION NO. 54.

The said Court erred in denying the motion of counsel for [334] said defendants to strike out all of the testimony of the witness William F. Bade with respect to the proceedings before Secretary of the Interior Fisher with respect to which the witness had testified that he was present at the meeting and that a charge had been made by officials of the Spring Valley Water Company that they had been denied access to a report made by C. E. Grunsky to J. R. Freeman with respect to certain properties of the Spring Valley Water Company, whereupon Secretary Fisher had asked about the report

and the same was produced by Mr. Freeman, handed to Secretary Fisher and by him handed to the Board of Army Engineers.

BEING EXCEPTION NO. 55.

LVI.

The said Court erred in overruling the objection of counsel for said defendants to and admitting in evidence Plaintiff's Exhibit No. 27, purporting to be matter copied from a paster on a map in the Bartell-Manson report, which paster purported to show a draw-off in the North Fork Reservoir 86 feet above the bottom of the reservoir.

BEING EXCEPTION NO. 56.

WHEREFORE, the said defendants pray that the judgment in favor of the plaintiff herein and against the defendants be reversed and that the said District Court of the United States in and for the Northern District of California, Second Division, be directed to grant a new trial of said cause.

GARRET W. McENERNEY,

Attorney for Plaintiffs in Error (Defendants in the Court Below.) [335]

[Endorsed]: Filed June 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [336]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Order Allowing Writ of Error.

Upon motion of Garret W. McEnerney, Esq., Attorney for the defendants in the above-entitled action, and upon the filing of a petition for writ of error and an assignment of errors herein,

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendants upon said writ of error be and the same is hereby fixed at the sum of Four Thousand ($4000.) Dollars, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending the determination of such writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated June 14th, 1915.

WM. C. VAN FLEET,
Judge. [337]

[Endorsed]: Filed June 14, 1915. W. B. Maling Clerk. By J. A. Schaertzer, Deputy Clerk. [338]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That Examiner Printing Company, a corporation, and William Randolph Hearst, as principals, and Hartford Accident and Indemnity Company, a corporation, as surety, are jointly and severally held and firmly bound unto the plaintiff in the above-entitled action in the sum of Four Thousand Dollars ($4000.00), to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors, representatives and assigns, firmly by these presents.

SIGNED with our seals and dated this 14th day of June, 1915.

WHEREAS, the above-named defendants are about to sue out a writ of error to the United States

Circuit Court of Appeals in and for the Ninth Circuit to reverse the judgment heretofore rendered in the above-entitled action, in favor of the plaintiff therein and against the defendants therein, and awarding judgment in favor of the plaintiff therein for the sum of Two Thousand Eight Hundred Dollars ($2,800) and for costs in the sum of Three Hundred and Ninety-eight and 25/100 Dollars ($398.25.) [339]

NOW, THEREFORE, the conditions of this obligation *is* such that if the above-named defendant shall prosecute such writ of error to effect and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

EXAMINER PRINTING COMPANY, a Corporation,

By W. F. BOGART,
Secy. & Treas.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, (Seal)
A Corporation.

By JOY LICHTENSTEIN,
Manager.

The foregoing bond is hereby approved this 14th day of June, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [340]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,780.

TAGGART ASTON,

Plaintiff,

vs.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,

Defendants.

I, WALTER B. MALING, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing three hundred forty(340) pages, numbered from 1 to 340, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $253.20; that said amount was paid by Garret W. McEnerney, attorney for defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 1st day of November, A. D. 1915.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

[Ten Cent Internal Revenue Stamp. Canceled Nov. 1, 1915. W. B. M.] [341]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Examiner Printing Company, a corporation, and William Randolph Hearst, Plaintiffs in Error, and Taggart Aston, defendant in error, a manifest error hath happened, to the great damage of the said Examiner Printing Company, a corporation, and William Randolph Hearst, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City

of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 14th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge. [342]

Receipt of a copy of the within Writ of Error is hereby admitted this 16th day of June, 1915.

JACOB M. BLAKE,
Attorney for Defendant in Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the

day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: No. 15,780. United States District Court for the Northern District of California, Second Division. Examiner Printing Co. et al., Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Writ of Error. Filed Jun. 18, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Taggart Aston, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Examiner Printing Company, a corporation, and William Randolph Hearst are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 14th day of June, A .D. 1915.

WM. C. VAN FLEET,
United States District Judge. [343]

United States of America,—ss.

On this 18th day of June, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, John E. Manders, a notary public, the subscriber, William J. Brennan, and makes oath that he delivered a true copy of the within citation to Taggart Aston, at the office of his attorney, J. M. Blake, Mills Building, San Francisco, California.

WILLIAM J. BRENNAN.

Subscribed and sworn to before me at San Francisco, this 28th day of June, A. D. 19—.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 15,780. United States District Court for the Northern District of California, Second Division. Examiner Printing Co., et al., Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Citation on Writ of Error. Filed Jun. 18, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2672. United States Circuit Court of Appeals for the Ninth Circuit. Examiner Printing Company, a Corporation, and William Randolph Hearst, Plaitniffs in Error, vs. Taggart Aston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed November 3, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Order Enlarging Time [to August 9, 1915] for Filing Record.

In the United States Circuit Court of Appeals for the Ninth Circuit.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,
Plaintiffs in Error,

vs.

TAGGART ASTON,
Defendant in Error.

It appearing to the Court that the plaintiffs in error have heretofore prepared and served their proposed bill of exceptions in the above-entitled action and that the defendant in error has served his proposed amendments thereto, and that said proposed bill of exceptions and said proposed amendments

have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said bill of exceptions has not yet been settled, and good cause appearing therefor,

IT IS HEREBY ORDERED that said plaintiffs in error may have and they are hereby granted to and including the 9th day of August, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk.

Dated July 12, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Examiner Printing Company, a Corporation, and William Randolph Hearst, Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Order Enlarging Time for Filing Record. Filed Jul. 12, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,
Plaintiffs in Error,

vs.

TAGGART ASTON,
Defendant in Error.

Order Enlarging Time [to September 9, 1915] for Filing Record.

It appearing to the Court that the plaintiffs in error have heretofore prepared and served their Proposed Bill of Exceptions in the above-entitled action, and that the defendant in error has served his Proposed Amendments thereto, and that said Proposed Bill of Exceptions and said Proposed Amendments have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said Bill of Exceptions has not yet been settled; and good cause appearing therefor,

IT IS HEREBY ORDERED that said plaintiffs in error may have and they are hereby granted to and including the 9th day of September, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk.

Dated August 7th, 1915.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Examiner Printing Comany, a Corporation, et al., Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Orders Enlarging Time for Filing Record. Filed Aug. 7, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,
Plaintiffs in Error,

vs.

TAGGART ASTON,
Defendant in Error.

Order Enlarging Time [to October 8, 1915] for Filing Record.

It appearing to the Court that the plaintiffs in error have heretofore prepared and served their Proposed Bill of Exceptions in the above-entitled action, and that the defendant in error has served his Proposed Amendments thereto, and that said Proposed Bill of Exceptions and said Proposed Amendments have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said Bill of Exceptions has not yet been settled; and good cause appearing therefor,

IT IS HEREBY ORDERED that said plaintiffs in error may have and they are hereby granted to and including the 8th day of October, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk.

Dated September 4th, 1915.

BLEDSOE, J.,
Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Examiner Printing Company, a Corporation, et al., Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Order Enlarging Time for Filing Record. Filed Sep. 4, 1915. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

EXAMINER PRINTING COMPANY, a Corporation, and WILLIAM RANDOLPH HEARST,
Plaintiffs in Error,

vs.

TAGGART ASTON,
Defendant in Error.

Order Enlarging Time [to November 8, 1915] for Filing Record.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiffs in error may have, and they are hereby granted, to and including the 8th day of November, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case for said court.

Dated October 6, 1915.

WM. W. MORROW,
Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Examiner Printing Company, a Corporation, et al., Plaintiffs in Error, vs. Taggart Aston, Defendant in Error. Order Enlarging Time for Filing Record. Filed Oct. 6, 1915. F. D. Monckton, Clerk.

No. 2672. United States Circuit Court of Appeals for the Ninth Circuit. Four Orders Under Rule 16 Enlarging Time to Nov. 8, 1915, to File Record Thereof and to Docket Case. Refiled Nov. 3, 1915. F. D. Monckton, Clerk.

No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

GARRET W. McENERNEY,
Attorney for Plaintiff in Error.

JOHN J. BARRETT,
ANDREW F. BURKE,
Of Counsel.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST, *Plaintiffs in Error,* vs. TAGGART ASTON, *Defendant in Error.*	No. 2672

BRIEF OF PLAINTIFFS IN ERROR.

I.

Statement of Case.

This is an action at law for libel. The defendant in error, whom, for purposes of convenience, we shall hereafter call the plaintiff, had judgment in the trial court, and from that judgment this writ of error is prosecuted. The alleged libel which is the basis of the action was contained in an article which appeared in an edition of the San Francisco Examiner published in Washington, D. C., on December 2, 1913. The corporation defendant is the publisher of the newspaper in which the article was published. The individual defendant was sued upon the theory expressed in the complaint that he was the "Managing Editor in charge

of'' the publication,[1] a fact as to which there is no evidence in the record, as we shall hereafter point out.

At the time of the publication of the Washington edition of the San Francisco Examiner, containing the alleged libelous article, there was pending before the United States Senate the application of the municipality of San Francisco for certain rights in the Hetch Hetchy Valley in California in connection with a municipal water supply. The plaintiff and others were actively resisting the grant of these rights. By letters and telegrams to members of Congress they were insisting that San Francisco had shown bad faith in its application for the Hetch Hetchy privileges; that it had available other adequate sources of water supply, and that it had suppressed engineering reports and data which showed that the rights sought by San Francisco were not necessary.[2] The plaintiff was particularly active in endeavoring to thwart the efforts of San Francisco to obtain the privileges which it was seeking. Associated with the plaintiff in this behalf was one Eugene J. Sullivan, president of the Sierra Blue Lakes Water & Power Company, a corporation which claimed to own certain water rights on the Mokelumne River in California, which were said to be available and adequate as a source of water supply for San Francisco. The said Sierra Blue Lakes Water & Power Company, through Sullivan, waged an active campaign in Congress to prevent San Francisco from acquiring the privileges which it sought in the Hetch Hetchy Valley, influenced

[1] R., p. 55.
[2] R., pp. 116, 118, 120, 121, 122, 129, 130, 132.

in this attitude as we claim, largely if not solely, by the circumstance that it felt that San Francisco would be compelled to acquire its properties if the Hetch Hetchy privileges sought by San Francisco from Congress were denied her.

In oral testimony and in written declarations to Congress Sullivan had stated that the plaintiff was the engineer of the Sierra Blue Lakes Water & Power Company.[3] In letters and telegrams to members of Congress the plaintiff had made the same statements.[4]

The City of San Francisco relied very strongly upon a report made by a Board of Army Engineers appointed at the behest of the Secretary of the Interior of the United States, to make an investigation of the sources of water supply available for San Francisco as a basis of determining whether or not the Hetch Hetchy privileges should be granted. The plaintiff and Sullivan contended that the Board of Army Engineers had been deceived in its findings through the fact that the City of San Francisco, upon which had been enjoined the duty of supplying data to the Board of Army Engineers, had not only been remiss in this duty, but had actually suppressed a report compiled by an Assistant City Engineer named Bartell,[5] which, according to the claim of the plaintiff and Sullivan proved that the Mokelumne water rights owned by the Sierra Blue Lakes Water & Power Company were ample as a source of water supply for San Francisco. The charge was made by the plaintiff and Sullivan that the city

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[3] R., pp. 116, 122, 139.
[4] R., pp. 116, 120, 122-123, 130.
[5] R., pp. 116, 117.

officials, particularly those in charge of the City Engineers' office in San Francisco, had deliberately suppressed this report.[6]

While the bill granting the Hetch Hetchy privileges sought by San Francisco was pending in the Senate, the Examiner Printing Company published at Washington a special edition of the San Francisco Examiner dealing with the water supply question in San Francisco and the needs and necessities of San Francisco in that behalf and urging the granting of the Hetch Hetchy privileges. Among the articles was one as follows:[7]

> "Inspiration of Opposition.
>
> "During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.
>
> "But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted received information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston" (R., p. 114).

(The Johnson referred to was a conservationist who was opposing the bill.)

On another page of the paper was a signed article by Representative Kent of California, who stated that:[8]

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[6] R., pp. 118, 126.
[7] R., p. 114.
[8] R., p. 113.

> "I want to state here and now that I have read this literature put out by these people * * *
>
> It has only one foundation in fact and that foundation is the letters of this man Sullivan, whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary" (R., p. 113).

These foregoing articles are the basis of the libel counted on in the action.

The innuendos in the complaint fix the sting of the libel as an imputation that the plaintiff was the "tool, sycophant or hireling of a thief" and of "a man who ought to be in the penitentiary",[9] and was associated with such a man in a conspiracy to defraud the City of San Francisco, and pursuant to that conspiracy had made gross and careless aspersions upon public officials. The plaintiff especially excepted to the use of the term "Sullivan's man" as though the term "man" was one of particular opprobrium, indicating that the plaintiff was a mere tool of Sullivan, engaged with him in a nefarious enterprise. The defendant William Randolph Hearst denied in his answer any participation in the publication.[10] The answer of his co-defendant Examiner Printing Company contained a plea of justification as well as one of mitigation. It was claimed by the Examiner Printing Company that Aston was an associate of Sullivan and was in the employ of the Sierra Blue Lakes Water & Power Company, and that nothing more was meant by the use of the term, "Sullivan's man Aston" than to indicate the

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[9] R., p. 21.
[10] R., p. 61.

fact that Aston was in the employ of Sullivan's Company. It was also alleged that Sullivan and the company of which he was president were endeavoring to sell their water rights to the City of San Francisco, and because of that fact were endeavoring to prevent San Francisco from acquiring the Hetch Hetchy privileges which, if acquired, would have rendered impossible a sale of the properties of the Sierra Blue Lakes Water & Power Company. It was alleged that the claims and representations of this company as to its water rights were so utterly disproportionate to the facts that the assertion of such claims and representations constituted an *objective* fraud.

We need not concern ourselves with the plea of mitigation for the reason that on the issue of malice in the publication as to which alone it was pertinent, the finding of the jury was in favor of the defendants.

After a trial lasting more than two weeks the jury returned a verdict in favor of the plaintiff in the sum of twenty-eight hundred dollars ($2800) as *compensatory* damages.[11] No award of *exemplary* damages was made, the jury thus by implication finding that the publication had not been inspired or actuated by malice.

No exception is taken to the instructions in the case nor will we question the sufficiency of the evidence to support the verdict. We do not by this mean to concede that the plaintiff was entitled to judgment in any amount. On the contrary we claim that the evidence was such as to warrant a verdict in favor of the defend-

[11] R., p. 80.

ants and insist that but for the erroneous reception of certain evidence such verdict would probably have been rendered. We recognize, however, the futility of insisting upon a claim of insufficiency of evidence in the face of a conflict in the evidence. We shall hereafter, therefore, confine ourselves to a discussion of the errors which we claim the court committed in the reception of evidence. We believe that the minds of the jury were distracted by immaterial evidence of a prejudicial character erroneously admitted by the trial court. We believe that but for this prejudicial evidence erroneously admitted the verdict of the jury would have been in favor of the defendants. Therefore while we do not claim that the evidence was insufficient to support the verdict, we do insist that the verdict was largely influenced, if not in fact brought about, by the reception of such immaterial and prejudicial testimony.

As before stated the claim of the plaintiff was that he had been libelled in three particulars. A previous article having stated that Sullivan was a "thief" and a "man who ought to be in the penitentiary", the plaintiff alleged that he was libelled in the article complained of, (a) in being referred to as "Sullivan's man"; (b) in the assertion that the "Sullivan-Aston scheme" was a "gross fraud"; and (c) in the charge that he in the furtherance of said scheme had made "gross and careless aspersions" on public officials. The alleged "Sullivan-Aston scheme" of course was the effort to sell the properties of the Sierra Blue Lakes Water and Power Company to San Francisco and the effort of the promoters of that scheme to defeat the Hetch Hetchy privi-

leges, the granting of which would render the sale impossible. It was a scheme to sell the properties of the Sierra Blue Lakes Water and Power Company that was claimed to be a "gross fraud". In the furtherance of that scheme it was said in the article complained of that the plaintiff and Sullivan had made "gross and careless aspersions" upon city officials, the Board of Army Engineers and engineers generally, particularly in charging that the city engineer of San Francisco had deliberately suppressed a report favorable to the properties of the Sierra Blue Lakes Water and Power Company.

The plaintiff's efforts therefore legitimately should have been directed to proof of the falsity of the charges (a) that the plaintiff was "Sullivan's man"; (b) that the "Sullivan-Aston scheme" was a "gross fraud"; and (c) that the plaintiff had made "gross and careless aspersions" upon city officials.

On the other hand the efforts of the defendant Examiner Printing Company under its plea of justification should have been directed to proof of the facts (a) that the plaintiff was an associate or employee of Sullivan or of the Sierra Blue Lakes Water and Power Company and was therefore "Sullivan's man"; (b) that the plaintiff and Sullivan were engaged in a scheme to thwart the efforts of San Francisco to obtain Hetch Hetchy privileges and thereby to compel San Francisco to purchase the properties of the Sierra Blue Lakes Water and Power Company, which scheme was a "gross fraud"; and (c) that in the furtherance of this scheme the plaintiff had carelessly made grave

charges of suppression of evidence against city officials, particularly against the city engineer of San Francisco without investigation and without foundation.

The issues, therefore, were well defined. The defendant Examiner Printing Company upon its part endeavored to show, and we claim succeeded in showing, by the testimony of Sullivan[12] and of the plaintiff himself,[13] that the plaintiff was in the employ of Sullivan and of his company and was therefore an associate of Sullivan, and in this sense at least was "Sullivan's man". This, it may be again remarked, was the only sense in which, according to the claim of the defendant, the term "Sullivan's man" was used in the article complained of. On the other issues the defendant offered evidence to show that Sullivan was actively engaged in promoting the sale of the properties of the Sierra Blue Lakes Water and Power Company to San Francisco;[14] that to accomplish said sale it was necessary that the privileges in the Hetch Hetchy Valley sought by San Francisco, be denied her, and that accordingly Sullivan was doing his utmost to defeat the granting of those privileges.[15] This was the so-called "Sullivan-Aston scheme". For proof of the fraudulent character of the scheme the defendant Examiner Printing Company relied upon the circumstance that the representations of the Sierra Blue Lakes Water and Power Company and of Sullivan were greatly exaggerated, the values

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[12] R., pp. 116, 122, 139.
[13] R., pp. 116, 120, 122-123, 130.
[14] R. pp. 155, 156.
[15] R., pp. 155, 156.

of the properties inflated,[16] and further that the difference between the represented and the actual values of the properties of the Sierra Blue Lakes Water and Power Company was so great[17] as to constitute the claim of Sullivan and of the company with respect to those properties *objectively* a "gross fraud". The plaintiff on the other hand claimed that he was not and never had been in the employ of Sullivan or of Sullivan's company.[18] The plaintiff further testified that he never had been engaged in any scheme to sell the properties of the Blue Lakes Water and Power Company to San Francisco,[19] and that the charge of "gross fraud" made with respect to such a scheme was unjustified as to him because he had never been engaged in it.

It was the claim of the plaintiff, which he endeavored to sustain by evidence, that his sole connection with the properties of the Sierra Blue Lakes Water and Power Company was as an engineer representing European capitalists whom he was endeavoring to persuade to purchase the properties in connection with a hydro-electric and irrigation project (R. p. 242). It appeared in the evidence, however, that the European capitalists whom the plaintiff was endeavoring to interest in the properties were interested in them solely because they believed that the properties could be sold

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[16] Plaintiff and Sullivan claim that Sierra Blue Lakes Water and Power Company could from its properties economically develop a supply of 350,000,000 gallons of water per day (R., p. 120). As against this, Mr. Grunsky's estimate was 60,000,000 gallons per day (R., p. 238). The Board of Army Engineers estimated it at 128,000,000 gallons per day (R., p. 272).

[17] The properties were offered to San Francisco for $6,000,000 but were offered to private individuals for $1,500,000 (R., p. 269).

[18] R., p. 174.

[19] R., pp. 242-243.

to San Francisco as a source of municipal water supply. The letters between these persons and the plaintiff through the intermediary of a Mr. Wilsey of Portland show conclusively that they were interested in the properties solely as a source of municipal water supply for San Francisco, and that they were continually inquiring about the possibility of a sale of the properties to San Francisco, and as bearing upon that question the possibility of Congress granting to San Francisco the Hetch Hetchy rights, which would defeat such a sale.

In reply to these inquiries the plaintiff informed the European capitalists by letter that there was a strong probability that San Francisco and the Bay cities would desire to adopt the Blue Lakes supply, and that it was conceded that the Hetch Hetchy privileges would be denied, a circumstance which in the minds of the plaintiff and of the Sierra Blue Lakes Water and Power Company would have rendered the purchase of the properties of the latter company by San Francisco almost a necessity. All of this correspondence will be found in the record at pages 274 et seq. It has a most vital bearing upon the question of the plaintiff's interest and motives in the campaign which he waged in Congress against San Francisco's application for Hetch Hetchy privileges, and in our opinion brings out in striking relief the error committed by the trial court in admitting evidence of the plaintiff's good reputation for truth and veracity, an error of which we hereinafter complain.

The plaintiff introduced evidence to prove that one Bartell, an assistant engineer in the office of the City Engineer of San Francisco had prepared a report dealing with available water rights on the Mokelumne River in California including water rights owned or claimed to be owned by the Sierra Blue Lakes Water and Power Company.[20] This report, claimed by the plaintiff to be favorable to the claims of the Sierra Blue Lakes Water and Power Company, had never been delivered to the Board of Army Engineers appointed to investigate the various sources of water supply available to San Francisco. This fact was the sole basis for the charge made by the plaintiff that the report had been wilfully and deliberately suppressed by the City Engineer's office.[21] But the defendant Examiner Printing Company showed that during the investigation by the Board of Army Engineers the City Engineer of San Francisco became ill and incapacitated[22] and that the work of investigating the Mokelumne River as a source of water supply had been delegated to C. E. Grunsky, another eminent engineer.[23] It was further shown that Mr. Grunsky filed an elaborate report with the Board of Army Engineers,[24] that during the preparation of that report he had access to the Bartell report,[25] that he had frequent consultations with Mr. Bartell,[26] its author, and that he had embodied in his own report much of the data of the Bartell report,

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[20] R., p. 189.
[21] R., pp. 126, 131.
[22] R., p. 225.
[23] R., p. 225.
[24] R., pp. 230, 231, 235.
[25] R., pp. 335, 338.
[26] R., p. 337.

among other things, many maps,[27] including one which, according to Mr. Grunsky, was the essence of the Bartell report and contained practically all of the conclusions of the Bartell report.[28] The plaintiff admitted that he had never seen the Grunsky report[29] although he knew that such a report had been prepared and was on file with the Board of Army Engineers. He admitted that he had been satisfied with reading excerpts from the Grunsky report contained in an independent report made by Mr. Freeman,[30] the engineer having general supervision of all of the investigations made on behalf of the City of San Francisco. This evidence, according to the claim of the Examiner Printing Company, indisputably establishes the fact that the plaintiff had been grossly careless in making his charge that the Bartell report had been suppressed from the Board of Army Engineers. While it did not get before that body as an independent report, the evidence showed that its essential features[31] were embodied in the report made by Mr. Grunsky which the plaintiff never examined and as to the contents of which he carelessly permitted himself to be ignorant while charging public officials with dereliction of duty and wilful suppression of evidence.

The foregoing statement of the issues in the case shows the efforts that should have been legitimately exerted by the respective parties in support of their claims and sufficiently indicates the limits within which we claim the evidence should have been confined. The

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[27] R., pp. 335, 336, 337.
[28] R., p. 338.
[29] R., pp. 230, 231.
[30] R., p. 231.
[31] R., p. 338.

evidence, however, was not confined within those limits, and it is for the erroneous reception of evidence not tending to prove the facts in issue but calculated to bias and prejudice the jury, that we complain.

II.

Specifications of Errors.

As already stated, no point is made that the evidence is insufficient to support the verdict. No exception is taken to the charge of the court. The errors of which we complain are limited exclusively to rulings on the admission of evidence.

The assignment of errors hereinafter contained sets forth forty-four rulings which we claim were erroneous. These rulings may be grouped into eight classes, however, inasmuch as many of the rulings present the same general question. The evidence which we claim was erroneously admitted concerned the following:

(1) Evidence of the plaintiff's good reputation in Europe and America "for the *truth* and *veracity* of his report as a consulting engineer";

(2) Evidence of articles in various newspapers throughout the United States on July 7th and July 8th, 1913, publishing the charges made by Eugene J. Sullivan of the suppression of a report and other charges against the City Engineer and other public officials of San Francisco (the article complained of was published December 2, 1913);

(3) Evidence of the fact that a report made by the witness Grunsky on the run-off from Alameda Creek had been turned in late to the Board of Army Engineers; and in connection therewith evidence of what transpired before the Secretary of the Interior at the time said report was delivered to the Board of Army Engineers;

(4) Evidence of statements made by the plaintiff at a meeting of the Civic Center League held in the Hotel St. Francis on November 5th, 1913 (the articles complained of were published December 2, 1913);

(5) Evidence by the witness William J. Wilsey to the effect that the plaintiff was in his employ and that no reports made by the plaintiff to the witness were made for the purpose of selling the properties of the Sierra Blue Lakes Water and Power Company to San Francisco, but were for use exclusively in selling said properties in Europe, and that this fact was known by the plaintiff;

(6) Evidence concerning the amount of money expended on the properties of the Sierra Blue Lakes Water and Power Company and the fact that that company had given options for the purchase of its properties for which a considerable consideration had been paid;

(7) Evidence of statements made in the San Francisco Examiner in its issues of November 30, 1913, and December 1, 1913, with respect to the proposed Washington edition of the San Francisco Examiner (these matters were objected to especially by the defendant Hearst);

(8) Evidence contained in copies of certificates filed with the Post Office authorities showing that the defend-

ant Hearst is the only person owning more than one per cent of the stock of various newspapers in the United States.

The assignments of error hereinafter contained do not embrace all of the assignments of error contained in the record. Some of the latter assignments we do not press for the reason that, although we believe them to be well made, other objections are of more pressing importance. We therefore exclude from the specification of errors which follows, those assignments of error with which we will not specially deal in the brief.

The matters with which we will hereafter deal and the errors upon which we seek a reversal are as follows:

Assignment No. 1.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Mr. Sullivan, how much, as near as you can recollect, have you expended on the company's water properties, in construction and in other works and matters, in order to maintain your company's and the bondholders', water rights and other rights since you became president of the company in 1910?"

to which the witness answered: "About $100,000", the same being contained in the transcript of record on page 152 and said ruling constituting Exception No. 3.

Assignment No. 2.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Was it necessary to obtain such moneys from time to time in order that the company's water rights and properties be maintained for the benefit of the bondholders and stockholders of the Sierra Blue Lakes Water and Power Company, of which you were the president?"

to which the witness answered: "It was.", the same being contained in the transcript of record on page 153 and said ruling constituting Exception No. 4.

Assignment No. 3.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. Did you consider them to be of such value that you would feel justified in paying heavy interest or making heavy sacrifices in order that you should obtain money necessary to obtain such rights and properties for your company and on behalf of your bondholders?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 153 and said ruling constituting Exception No. 5.

Assignment No. 4.

The court erred in overruling the objection of counsel for the defendants to the following question asked by

counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. I will ask you, Mr. Sullivan, whether or not during the time since you became president of the company, you have had outstanding any options for the purchase, whether you have given any options for the purchase of your properties, upon which a considerable consideration was paid down?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 154 and said ruling constituting Exception No. 6.

Assignment No. 5.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. What was that statement, Mr. Sullivan?" (referring to a statement made by the plaintiff at a meeting of the Civic Center League on November 5, 1913, at the Hotel St. Francis)

to which the witness answered:

> "He said to the audience that there was a report made by an assistant city engineer named Max J. Bartell on the Mokelumne River upper catchment in which that report said that the Mokelumne River watershed would supply four hundred and some odd—He stated that there was a report suppressed from the Advisory Board of Engineers, on the water supply.",

the same being contained in the transcript of record on page 164 and said ruling constituting Exception No. 9.

Assignment No. 6.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. I will ask you to state whether or not Mr. O'Shaughnessy took any notice of the statements made by Mr. Aston and made any reply thereto, any public reply thereto?"

to which the witness answered: "He did.", the same being contained in the transcript of record on page 165 and said ruling constituting Exception No. 10.

Assignment No. 7.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness Eugene J. Sullivan:

> "Q. So far as you can recall, what was his answer to the statement that there was such a report as Mr. Aston stated to be in existence?"

to which the witness answered:

> "He said that Mr. Max J. Bartell was merely one of one hundred and fifty assistants.",

the same being contained in the transcript of record on page 166 and said ruling constituting Exception No. 11.

Assignment No. 8.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 2. State whether or not in or about May, 1913, you employed the plaintiff, Taggart Aston, to make

> an engineering report upon an hydro-electric and irrigation project in California.''

to which the witness answered: ''I did.'', the same being contained in the transcript of record on page 174 and said ruling constituting Exception No. 12.

Assignment No. 9.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 3. If you answer the last interrogatory in the affirmative, state in connection with what particular project or property you employed Mr. Aston to make such a report.''

to which the witness answered:

> ''Known in California as the Sierra Blue Lakes Water & Power Company.''

the same being contained in the transcript of record on page 175 and said ruling constituting Exception No. 13.

Assignment No. 10.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 4. If you state that the project upon which said report was to be made was that connected with the Sierra Blue Lakes Water and Power Company's properties on the Mokelumne River in California, state whether or not these properties are also known as 'The Sullivan Properties,' and whether or not they are the property of a company of which Mr. Eugene J. Sullivan was at that time the president.''

to which the witness answered:

> ''Yes, they are the same properties.'',

the same being contained in the transcript of record on page 175 and said ruling constituting Exception No. 14.

Assignment No. 11.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 5. State whether or not the report made by Mr. Aston pursuant to his employment by you, was in writing; also whether or not he made more than one such report to you in connection with these properties."

to which the witness answered:

> "Yes, he made a supplemental report later which I asked him to make.",

the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 15.

Assignment No. 12.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 7. State whether said report or reports were obtained by you, or were ever used by you, for the purpose of selling the so-called Sullivan properties on the Mokelumne River in California, to the City of San Francisco."

to which the witness answered:

> "No, I never offered anything to the city of San Francisco."

the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 16.

Assignment No. 13.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 8. State whether or not said report or reports were obtained by you for use exclusively in offering said properties for sale in Europe."

to which the witness answered: "They were.", the same being contained in the transcript of record on page 176 and said ruling constituting Exception No. 17.

Assignment No. 14.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 9. If your answer to the last interrogatory is in the affirmative, state whether or not you offered said properties for sale in Europe."

to which the witness answered:

> "I did, I offered the properties for sale in Europe."

the same being contained in the transcript of record on page 177 and said ruling constituting Exception No. 18.

Assignment No. 15.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 10. If you answer the foregoing interrogatory in the affirmative, state whether or not Mr. Aston had an interest, contingent or otherwise, in any sale that you might make of said properties in Europe."

to which the witness answered:

> "No understanding whatever with Mr. Aston as to any commission, but I certainly intended to give him fair commission out of any work I done; but there is no written proposition of any kind. In fact, he never asked any questions.",

the same being contained in the transcript of record on page 177 and said ruling constituting Exception No. 19.

Assignment No. 16.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 12. If you answer the last interrogatory (as to whether or not he had informed the plaintiff who the parties were in Europe with whom he was negotiating for the sale of said properties) in the affirmative, state whether or not you notified Mr. Aston as to any particular use or purpose for which said properties were desired by said parties in Europe, if in fact any particular use or purpose was specified."

to which the witness answered:

> "Yes, I told him what we were figuring on using the properties for, and the purposes were hydro-electric and irrigation."

the same being contained in the transcript of record on page 178 and said ruling constituting Exception No. 20.

Assignment No. 17.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> "Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world,

> meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this country and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer.''

to which the witness answered: ''Yes, I do.'', the same being contained in the transcript of record on page 179 and said ruling constituting Exception No. 22.

Assignment No. 18.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William J. Wilsey:

> ''Q. 20. State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid.''

to which the witness answered:

> ''From all the information that I have been able to secure regarding Mr. Aston, both in America and in Europe, his reputation has been first class.''

the same being contained in the transcript of record on page 179 and said ruling constituting Exception No. 23.

Assignment No. 19.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Richard Harte Keatinge:

> ''Q. Well, make a fair statement of the nature of your relations with Mr. Aston at that time, from which the jury can draw the conclusion with reference to these properties and to any report which you know he made upon those properties at that time.''

to which the witness answered:

> "Mr. Wilsey employed Mr. Aston to make this report—Mr. W. J. Wilsey of Portland. We paid half the expense of making the investigation, but I do not believe that Mr. Aston was ever in our employ. I don't know whether legally he was ever in our employ. We paid half the expense and Mr. Wilsey paid the other half of the expense, but he was Mr. Wilsey's man, I should say."

the same being contained in the transcript of record on page 180 and said ruling constituting Exception No. 24.

Assignment No. 20.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Clement H. Miller:

> "Q. I will ask you to state whether or not you have any recollection of Mr. Aston making a statement of what his connection was with reference to having disclosed certain facts and conditions surrounding the suppression of the so-called Bartell-Manson engineering report of the city at that meeting at that time and place." (Civic Center Meeting on November 5, 1913)

to which the witness answered:

> "Mr. Aston read quite a lengthy statement from manuscript, and I have a general recollection of the main points that were covered in that statement. * * * It was particularly relating to that suppressed report."

the same being contained in the transcript of record on page 181 and said ruling constituting Exception No. 25.

Assignment No. 21.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness George A. McCarthy:

> "Q. If you answer the foregoing interrogatory (as to whether the witness had gone to the City Engineer's office toward the end of June, 1913, for the purpose of inspecting the original of the Bartell report) in the affirmative, state whom you saw in connection with the object of your errand, and what was said and done between you upon that occasion in connection with said suppressed report."

to which the witness answered:

> "I saw Mr. Bartell and made known the object of my visit, which was to obtain use of, if possible, the report and documents which had been returned to his office, or if they could not be removed from the office, to make certain extracts from them. Mr. Bartell produced a copy of the report and examined it in my presence, but would not allow me to again have possession of it nor to make any extracts from it."

the same being contained in the transcript of record on page 183 and said ruling constituting Exception No. 26.

Assignment No. 22.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness George A. McCarthy:

> "Q. If you answer the foregoing interrogatory in the affirmative, state who were present at such conversation or conversations, where they were held; and what was said or done there, with reference to said report. Did you see the original of said report then and there in the possession of Mr. Bartell?"

to which the witness answered:

> "The only conversation I had with Mr. Bartell regarding the report was on the occasion of my visit to his office in June, when I again endeavored to obtain the document for purposes of reference. No person was present except Mr. Bartell, and he refused

> to allow the document to again go out of his office or to allow any extracts to be made from it. Mr. Bartell produced the copy of the report, but to the best of my knowledge it was not the copy we had in the office of Mr. Taggart Aston. The original contained many marginal notes in pencil which the copy produced by Mr. Bartell did not contain, to the best of my knowledge."

the same being contained in the transcript of record on page 184 and said ruling constituting Exception No. 27.

Assignment No. 23.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Stanley Behneman:

> "Q. Will you state in your own way the facts and circumstances in connection with that episode?" (the visit of an employee of the City Engineer's office to the office of the plaintiff, to make a demand for the return of certain data)

to which the witness answered:

> "It was shortly before one o'clock. This gentleman I did not know at the time when he entered the door; he made certain demands—he said he was from the engineering department of the City of San Francisco and he wished to have certain records and plans which Mr. Aston had taken. I don't know under what conditions they were taken. He wanted them right away, or he would have a warrant issued for them. He appeared to be very excited. He wanted to know when Mr. Aston would return. I told him I did not know. He said he would wait a while. He did wait quite a while and then he decided to go and he said that these documents must be back by one o'clock."

the same being contained in the transcript of record on page 187 and said ruling constituting Exception No. 30.

Assignment No. 24.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. Now, I will ask you, Mr. Aston, to state briefly what you may have done in calling upon the city, as is stated here in this letter, in company with Mr. Hart and Mr. Burleson, and state whether or not you were then shown a copy of the so-called Bartell-Manson report with the essential statement referred to in your letter here?"

to which the witness answered:

> "On account of my assistant, Mr. McCarthy, having informed me that he had noticed in the copy shown to him by Mr. Bartell that this essential statement, which of course was the whole gist of this report which had affected me in communicating with Washington—on account of Mr. McCarthy having told me that he had not seen this essential statement in the copy which Mr. Bartell showed to him, I informed the president of the board of health, Mr. Barendt, who called at my office,—I had never known him before, I informed him that I believe that the city was now showing a copy which they purported to be this report, in which they had eliminated this very essential statement made by Mr. Manson, the city engineer, Mr. Barendt, on the 8th day of July, went up to Mr. Judell, his fellow-official. By reason of what was told me by Mr. Barendt on his return, I requested Mr. Barendt to go back with me to Mr. Judell in order that I could further investigate what Mr. Barendt had told me regarding it, which coincided with what Mr. Bartell had told me. Mr. Judell had shown Mr. Barendt this report. I went with Mr. Barendt to Mr. Judell's office. Mr. Barendt introduced me to Mr. Judell. Mr. Judell was the president of the board of works. He was at the head of all the engineering department. As the chief official, responsible for the city, I told Mr. Judell that I would like to see this

> report, as I wished, if I found this elimination had been made, I wished to make the charge that the elimination had been made. I asked Mr. Judell would he kindly do as he had done with Mr. Barendt, show me that report as the chief of the public works department and chief of the engineers' department. Mr. Judell said, 'I will not show you that report, because we are not going to help the enemies of Hetch Hetchy'. Then I asked Mr. Judell would the engineering department show it to me. He said he could not speak for the engineering department * * * On account of that, I asked Mr. Barendt to come up with me to the engineering department. Mr. Barendt said, 'this will get me in bad with the department if I pursue this matter any further'."

the same being contained in the transcript of record on page 252 and said ruling constituting Exception No. 32.

Assignment No. 25.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. State whether or not you had occasion to make any public statements with reference to the matter of this report and of your interest in disclosing the fact of it on November 5, 1913, before the Civic Center meeting at the St. Francis?"

to which the witness answered:

> "I had asked Mr. O'Shaughnessy to give me ten or fifteen minutes to look into the Mokelumne matter, and I told him that I thought that after he had heard and seen my data on it I was sure that he would personally remove the misrepresentations made regarding it in the previous report. This was in a conversation over the 'phone. It was either the day before or two days before the Civic Center meeting. Mr. O'Shaughnessy replied very sharply that he was too busy, he would give me no time. As this was the first public meeting at which anyone had an opportunity to remove certain miscon-

> ceptions that had been planted in the people's mind by the fact of the newspapers not publishing anything but one side of the matter, I therefore decided that it was the proper opportunity for me to tell the public my view of the question, especially as the 'Examiner' and others had referred to me as Mr. Sullivan's engineer and had connected me with him in the matter, and in a manner that I did not approve of. I therefore wrote out a speech which I delivered at the meeting. It was a meeting at which both sides were heard, and at which discussion was had on the various papers. I therefore wrote out a speech and delivered that speech. I afterwards had it printed and sent it to each of the senators before this libel was published. I have an acknowledgment from senators in regard to having received the printed document which is a true copy of the written-out speech that I had made at the time.''

the same being contained in the transcript of record on page 255 and said ruling constituting Exception No. 33.

Assignment No. 26.

The court erred in overruling the objection of counsel for the defendants to and in admitting in evidence a copy of the San Francisco Examiner of Thursday, November 6, 1913, purporting to give an account of the proceedings of the Civic Center meeting of November 5, 1913, and what was said and done by the various speakers of said meeting, the same being contained in the transcript of record on page 257 and said ruling constituting Exception No. 34.

Assignment No. 27.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. Did you make any statement at that time and place (Civic Center meeting) with reference to the fact that this supply from the Mokelumne had been discriminated against in various city reports?"

to which the witness answered: "Yes, sir.", the same being contained in the transcript of record on page 263 and said ruling constituting Exception No. 35.

Assignment No. 28.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness Taggart Aston:

> "Q. State in what points you made the statement that the supply had been discriminated against."

to which the witness answered:

> "I stated that the city's reports had been biased in that they made unfair comparisons, they minimized our sources, supplies, and estimates of our sources, and exaggerated the estimates of other sources and thus made a false and unfair comparison with the Hetch Hetchy project. In particular, I mentioned one instance wherein Mr. Freeman's report, in a very essential item, the item of concrete in the Hetch Hetchy dam as compared with the Mokelumne dams, he priced the Mokelume dam——"

the same being contained in the transcript of record on page 263 and said ruling constituting Exception No. 36.

Assignment No. 29.

The court erred in overruling the objection of counsel for the defendants and in admitting in evidence a copy of the San Francisco "Examiner" of November 30, 1913, purporting to contain a statement respecting the proposed Washington edition of said San Francisco

"Examiner", about to be published, the same being contained in the transcript of record on page 300 and said ruling constituting Exception No. 37.

Assignment No. 30.

The court erred in overruling the objection of counsel for said defendant William Randolph Hearst and in admitting the evidence over the objection of said defendant the exhibit mentioned in the last preceding assignment of error, the same being contained in the transcript of record on page 301 and said ruling constituting Exception No. 38.

Assignment No. 31.

The court erred in denying the motion of counsel for said defendants to strike out the testimony of witness Thomas R. Marshall with respect to a conversation between the witness and John Temple Graves concerning the Hetch Hetchy bill, and the request of Mr. Graves that the witness give him a written statement to the effect that the witness would vote for the Hetch Hetchy bill if the matter came up to him, the same being contained in the transcript of record on page 310 and said ruling constituting Exception No. 39.

Assignment No. 32.

The court erred in overruling the objection of counsel for said defendants to and in admitting in evidence an article in the San Francisco "Examiner" of December 1st, 1913, purporting to be a newspaper dispatch under the headline "Marshall for Hetch Hetchy. Vice-presi-

dent will cast vote for water bill if necessary. Gives views to the 'Examiner'. Writes for special edition that is to be printed in Washington''. Said dispatch contained a purported statement from Hon. Thomas R. Marshall, Vice-president of the United States, giving his reasons for supporting the Hetch Hetchy bill, the same being contained in the transcript of record on page 311 and said ruling constituting Exception No. 40.

Assignment No. 33.

The court erred in overruling the objection of counsel for said defendants and admitting in evidence the matter in the article of the San Francisco ''Examiner'' of December 1st, 1913, immediately following the purported dispatch referred to in the last preceding assignment of error, which succeeding matter purports to be a statement concerning the proposed Washington edition of the San Francisco ''Examiner'' and the manner in which it would be distributed, the same being contained in the transcript of record on page 312 and said ruling constituting Exception No. 41.

Assignment No. 34.

The court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the ''Arizona Gazette'', a newspaper of July 7, 1913, purporting to contain a Washington dispatch under the heading ''Hetch Hetchy Chicanery'', and stating that Eugene J. Sullivan of San Francisco had before the House Public Lands Committee made charges of chicanery suppression of report and political bias of the engineers in the interest of the Hetch Hetchy project

for supplying San Francisco with water, the same being contained in the transcript of record on page 314 and said ruling constituting Exception No. 42.

Assignment No. 35.

The court erred in overruling the objection of counsel for said defendants to and admitting in evidence a copy of the "Evening World-Herald" newspaper of Omaha, Nebraska, dated July 7, 1913, containing an article under the heading "Alleges crookedness in Hetch Hetchy plan," and which said article was practically identical with the article referred to in the last preceding assignment of error, the same being contained in the transcript of record on page 314 and said ruling constituting Exception No. 43.

Assignment No. 36.

The court erred in overruling the objection of counsel for the defendants to and admitting in evidence a copy of the "Herald Republican" newspaper of Salt Lake City, Utah, dated July 8, 1913, containing an article headed "Charges Chicanery in Hetch Hetchy Project", which said article was practically identical with the article referred to in the last preceding assignment of error, the same being contained in the transcript of record on page 315, and said ruling constituting Exception No. 44.

Assignment No. 37.

The court erred in overruling the objection of counsel for defendants to and admitting in evidence Plaintiff's Exhibit No. 44, purporting to be certified copies of

certificates filed with the post-office authorities for the purpose of showing the proprietorship and ownership of the San Francisco "Examiner" of San Francisco, California, the Los Angeles "Examiner" of Los Angeles, California, the Atlanta "Georgian" of Atlanta, Georgia, the Chicago "Evening American" of Chicago, Illinois, the Boston "American" of Boston, Mass., and the New York "Evening Journal" of New York, N. Y. Said certificates purport to show that all of the papers referred to are published by corporations with the exception of the Los Angeles "Examiner", which is published by William Randolph Hearst, and that said William Randolph Hearst is the only person named as owner of stock of the corporations owning the other papers mentioned, the same being contained in the transcript of record on page 320, and said ruling constituting Exception No. 47.

Assignment No. 38.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Q. With reference to your employment at or about this time to furnish a report of the run-off from Alameda Creek proper of the Spring Valley Water Company, that report of yours was turned in when?"

to which the witness answered:

> "The statement I made this morning with reference to turning in everything to the Army Board related to the matter that bore upon the report that was then under discussion.",

the same being contained in the transcript of record on page 369, and said ruling constituting Exception No. 48.

Assignment No. 39.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Do you know what became of that report of yours that you turned in? Did it go to the Army Board?"

to which the witness answered:

> "The report was delivered very late. I don't remember the date. I haven't had occasion to look at it for a long time. I think that was delivered some time in October or November."

the same being contained in the transcript of record on page 370, and said ruling constituting Exception No. 49.

Assignment No. 40.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for the plaintiff of the witness C. E. Grunsky:

> "Q. Were your conclusions upon that investigation favorable or unfavorable to the Spring Valley Water Company's contention?"

to which the witness answered:

> "I cannot say as to whether it was favorable or unfavorable to the city or to the Spring Valley Water Company. The finding with reference to the quantity of water flowing in Alameda Creek was not at great

> variance with what was claimed by the Spring Valley Water Company.''

the same being contained in the transcript of record on page 371, and said ruling constituting Exception No. 50.

Assignment No. 41.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> ''Q. And Mr. Freeman was there in the representative capacity of furnishing or accounting for the furnishing of data which the Secretary had called for under the order of the continuance, the show cause order?''

to which the witness answered:

> ''Mr. Freeman expressly stated he was representing the city officials, and Mr. Fisher so accepted it.''

the same being contained in the transcript of record on page 382, and said ruling constituting Exception No. 51.

Assignment No. 42.

The court erred in overruling the objection of counsel for the defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> ''Q. State whether or not anything came out at that hearing with reference to any suppressed report which had not been furnished up to the date of that hearing.''

to which the witness answered: ''Yes, sir'', the same being contained in the transcript of record on page 382, and said ruling constituting Exception No. 52.

Assignment No. 43.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for plaintiff of the witness William F. Bade:

> "Q. State what if anything appeared at this hearing as coming from the city, or the representative of the City of San Francisco, which showed that there was in existence a report with reference to any available water supply to San Francisco which had not reached the Army Board or the Secretary of the Interior up to that time."

to which the witness answered:

> "On the complaint of Mr. McCutcheon to Secretary Fisher that the Marks-Grunsky-Hyde report, that they had never been permitted access to it although repeated requests had been made; upon that presentation by Mr. McCutcheon Secretary Fisher asked for that report, if there was such a report—asked Mr. Freeman, representing the city. Mr. Freeman then produced the report and said it was the only copy he had, and turned it over to Secretary Fisher, and he to the Advisory Army Board who also stated that they had not had access to it."

the same being contained in the transcript of record on page 384, and said ruling constituting Exception No. 53.

Assignment No. 44.

The court erred in overruling the objection of counsel for defendants to the following question asked by counsel for the plaintiff of the witness William F. Bade:

> "Q. What did Mr. Freeman say?"

to which the witness answered:

> "Mr. Freeman then handed over the report and said it was the only copy he had, but he was willing to turn it over to Secretary Fisher and the Army Board."

the same being contained in the transcript of record on page 386, and said ruling constituting Exception No. 54.

Assignment No. 45.

The court erred in denying the motion of counsel for defendants to strike out all of the testimony of the witness William F. Bade with respect to the proceedings before Secretary of the Interior Fisher with respect to which the witness had testified that he was present at the meeting and that a charge had been made by officials of the Spring Valley Water Company that they had been denied access to a report made by C. E. Grunsky to J. R. Freeman with respect to certain properties of the Spring Valley Water Company, whereupon Secretary Fisher had asked about the report and the same was produced by Mr. Freeman, handed to Secretary Fisher and by him handed to the Board of Army Engineers, the same being contained in the transcript of record on page 387, and said ruling constituting Exception No. 55.

III.

Argument.

A. THE COURT ERRED IN ADMITTING PROOF OF THE GOOD REPUTATION OF THE PLAINTIFF IN ADVANCE OF AN ATTACK THEREON BY THE DEFENDANTS.

In the deposition of William J. Wilsey, one of the witnesses for the plaintiff, he was asked what was the reputation of the plaintiff "for the *truth* and *veracity* of his reports as a consulting engineer".[32] He replied that

[32] R., p. 179.

as far as he had been able to ascertain plaintiff's reputation both in Europe and America was first-class.[33] The admission of this evidence is the basis of assignments of error numbers 18 and 19.

At no time throughout the trial did the defendants call in question the plaintiff's good reputation as a man or as an engineer. Not only, therefore, was the evidence of the plaintiff's good reputation admitted in advance of an attack by the defendants but in the absence of any attack by the defendants. The reception of such evidence was clearly erroneous.

The plaintiff offered himself as a witness upon the trial. As a witness he was entitled to the same consideration as every other witness. The defendants were entitled to have his testimony weighed by the jury in the same manner and according to the same standard as the testimony of the other witnesses. They were entitled to have the jury apply to the testimony of the plaintiff the same criteria as they applied to the testimony of all other witnesses. It is because it is impossible for a court to determine how much weight and influence evidence of good reputation of a witness for "truth and veracity" has upon the mind of a jury in determining the amount of credit to be given to his testimony that courts almost universally reject such evidence. As said in *Title Insurance, etc., Co. v. Ingersoll,* 153 Cal. 1, it "may have been all-powerful to that effect". In short, it may be the factor that turns the scale in favor of the plaintiff upon the issues involved in the case.

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[33] R., p. 180.

The rule "supported by a practical unanimity of authority" is that evidence of the good reputation of a plaintiff in an action for libel is never admissible in advance of an attack upon it by the defendant.

Davis v. Hearst, 160 Cal. 143, 185.

In the opinion in the latter case numerous authorities are cited in support of this proposition.

See, also,

Title Insurance Co. v. Ingersoll, 153 Cal. 1.

The rule enunciated in *Davis v. Hearst* is codified in Section 2053 of the Code of Civil Procedure of California in the following language:

> "Evidence of the good character of a party is not admissible in a civil action nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character."

This statute and the construction placed upon it by the Supreme Court of California are binding upon the federal courts. Authorities to this proposition are unnecessary.

See, however,

2 Foster on Federal Practice, 1573, and cases cited.

In *Ryan v. Bindley,* 1 Wall. 66; 17 L. Ed. 559, it is said (p. 560):

> "The rules of evidence prescribed by the laws of a state are rules of decision for the United States courts while sitting within the limits of such state under the 34th Section of the Judiciary Act."

See, also,

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420.

It may be stated in passing that the rule stated in Section 2053 of the Code of Civil Procedure was not intended by the framers of the code to make any new rule; in fact the section merely expresses the common law rule, which excludes evidence of good reputation in advance of an attack, and which, as stated in *Davis v. Hearst,* supra, is "supported by a practical unanimity of authority".

In *Vance v. Richardson,* 110 Cal. 414 (1895), the court said:

> "Section 2053 of the Code of Civil Procedure is merely a concise statement of the rule as it is to be found in the text books and judicial decisions."

As we have already pointed out, this statutory provision is binding upon the federal courts; so likewise is the construction placed upon it by the Supreme Court of California.

The question whether evidence of the good reputation of a plaintiff is admissible in advance of an attack, in a federal court in California is definitely determined and answered in the negative by Section 2053 of the Code of Civil Procedure of California as construed in *Davis v. Hearst,* supra. Lest it be claimed, however, that the decision in *Davis v. Hearst* was made without reference to Section 2053 of the Code of Civil Procedure, because that section is not mentioned in the decision, it may be observed that this circumstance is

of no effect. This court is bound to assume that the Supreme Court of California in deciding *Davis v. Hearst* did so with reference to the provisions of Section 2053 of the Code of Civil Procedure. It cannot be presumed that the California Supreme Court did not know of the existence of Section 2053, or, that knowing of its existence, did not give to it the force and effect to which it was entitled.

In *Cross v. Allen* (1891), 141 U. S. 528, the court said (p. 538):

> "The only remaining question is, whether, under the Constitution and laws of Oregon in force at the time these contracts were made, a married woman could, in an event, bind her separate property for the payment of her husband's debts. *Without discussing this question upon its merits, it is sufficient to say that the Supreme Court of the State has decided it in the affirmative in at least two separate cases* (Moore v. Fuller, 6 Or., 274, and Gray v. Holland, 9 Or., 513); *and it is not our province to question such construction.* Being a construction by the highest court of the State of its Constitution and laws, we should accept it.
>
> "It is said, however, that the cases just cited were decided without having been fully argued and without mature consideration of this question, upon the mistaken assumption that it had been previously decided in the affirmative by the Supreme Court if the State, and, therefore, they have not become a rule of property in the State and are not binding upon this court. We are not impressed with this contention. Such argument might with propriety be addressed to the Supreme Court of the State, but it is without favor here. *We are bound to presume that when the question arose in the State court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon.*"

In *In re Floyd & Hayes* (1915), 225 Fed. 262, the syllabi are as follows:

> "Federal courts are bound to assume that, when a question arose in a state court, it was thoroughly considered by that tribunal, and that the decision rendered by it embodied its deliberate judgment.
>
> "Unless some federal question is involved, the interpretation placed upon a state statute by the highest appellant tribunal of the state is binding and conclusive upon all federal courts, including the United States Supreme Court.
>
> "It is the duty of a federal court to follow the latest decision of the state court, though it may differ from prior decisions of that court, and though the federal court may have previously come to a different conclusion."

If, therefore, the decision in *Davis v. Hearst* be given the controlling effect on the construction of Section 2053 of the Code of Civil Procedure of California to which the authorities hold it is entitled, there can be no question but that the trial court in the present case committed error in receiving evidence of the plaintiff's good reputation in advance of an attack by the defendants.

Even though we were to assume, however, that the construction of Section 2053 of the Code of Civil Procedure was not foreclosed by the decision in *Davis v. Hearst* but on the contrary was an open question, it is clear that under it no evidence of good reputation of a party is admissible in any action in advance of an attack upon it. This can be made very clear.

Evidence of the character (good or bad) of a *party* is never admissible in a civil action unless the issue involves character.

Vance v. Richardson, 110 Cal. 414 (1895);
Van Horn v. Van Horn, 5 Cal. App. 719 (1907);
Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1 1908.

See, also,

Gould v. Bebee, 134 La. 123; 63 So. 848 (1913);
5 Am. & Eng. Encyc. of Law, (2nd Ed.) 852.

The portion of Section 2053, C. C. P., therefore, which provides that "evidence of the good character of a party is not admissible in a civil action * * * *unless the issue involves his character*", does not add anything to the preceding portion. Upon common law principles unless the issue involves character, no evidence of the character of either party (*quoad* party) is admissible. Section 2053, therefore, in permitting evidence of the good character of a party in a civil action which involves his character, did not add anything to the common law rule. Such evidence was *always* admissible at common law *when the issue involved character,* just as it was *never admissible* at common law *unless the issue involved character.* The latter portion of Section 2053, therefore, merely affirms the common law rule and makes it essential that the issue involve character before a party is permitted to prove his good character.

It will be noted that Section 2053 deals with two classes of persons (a) parties, and (b) witnesses. The

term "parties" as used in this section can only mean "parties *who are not witnesses,*" for otherwise there would be no necessity for a distinction between "parties" and "witnesses". Reading the section as it stands, but eliminating the portions dealing with witnesses (including of course "parties" who have testified) the section provides that

> "Evidence of the good character of a party is not admissible in a civil action *until* the character of such party has been impeached or *unless* the issue involves his character."

It is evident from the section as thus read that evidence of the good character of a "*party*" can be given only after such character has been impeached. And inasmuch as the character of a party (*quoad* party) can be impeached only where the issue involves character, it necessarily follows that in order that evidence of the good character of a party may be given in a civil action it is necessary (a) that the action involve character, and (b) that the party's character be first impeached.

That this is the proper construction of the section is evident from the different conjunctions that introduce the two clauses of the section,—"*until* the character of such party or witness has been impeached" and "*unless* the issue involves his character". The latter clause is introduced by the conjunction "unless" (i. e., "except") and shows that evidence of good character is inadmissible in any civil action *except* civil actions involving character. The clause introduced by the conjunction "until" does not mark an exception, strictly

so-called, but rather a limitation of time. In other words, the use of the two conjunctions "until" and "unless" in Section 2053 of the Code of Civil Procedure clearly manifests the purpose of the Legislature to exclude evidence of good character in all civil actions *except those involving character,* and even in such cases to exclude such evidence *until* the party's good character has been impeached. In short, the second clause of the section indicates the *class* of cases in which evidence of the party's character is admissible, and the former clause indicates the *time* during the trial of such cases when such evidence becomes admissible. The result is that under the statutory law of California, evidence of good character of a party (*quoad* party) is never admissible *unless* the issue involves character and even then not *until* the good character of the party has been first impeached.

This is the necessary construction of the statute; it is the construction demanded by the plain import of the language of the statute, and independent of the controlling effect of the decision of *Davis v. Hearst;* it is the construction, we submit, which must be adopted by this court. In addition it is the construction which, as Mr. Justice Henshaw says in *Davis v. Hearst,* "is supported by a practical unanimity of authority".

We submit, therefore, that the court erred in the reception of evidence of the plaintiff's good reputation not only in advance of an attack thereon by the defendants but in the utter absence of such an attack.

Lest it be claimed, as it was in the trial court, that such evidence even though erroneous was not preju-

dicial, it may be observed that a similar argument has been advanced without success in numerous other cases. In fact it is the common argument of a litigant who succeeds in getting incompetent evidence before a jury and secures a verdict in his favor, that after all the error committed in the reception of the evidence was not prejudicial. The answer which should be made to such an argument is well put in *Miller v. Territory of Oklahoma,* 149 Fed. 330, where the court replying to a like argument said (p. 339):

> "The reply the law makes to such suggestion is: That after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged * * * that whatever the prosecutor against the protest of the defendant has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

In *Title Insurance & Trust Co. v. Ingersoll,* 153 Cal. 1, evidence of the good reputation of the defendant was admitted. The Supreme Court held the admission of this evidence to be erroneous, and in reply to the argument that the error was not prejudicial, said (p. 9):

> "It is impossible for this court to say how much weight and influence this evidence of good reputation of the witness had upon the mind of the trial judge in determining the amount of credit to be given to his testimony. As has been said before, under the peculiar circumstances of this case, it 'may have been all-powerful to that effect,' and may have been the factor that turned the scale in favor of defendant upon the matters embraced in the findings we have discussed. Counsel for defendant evidently thought it was important evidence,

> or they would not have offered it, and the trial judge evidently considered it material, or he would not have admitted it. If the trial court was led to place more reliance upon the testimony of defendant by reason of such evidence of reputation than he would otherwise have done, and we cannot say that this was not the result, plaintiff was clearly prejudiced by the rulings admitting it".

In numerous instances judgments in favor of plaintiffs in *libel* actions have been reversed for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack.

See,

Davis v. Hearst, 160 Cal. 143;
McCabe v. Platter, 6 Blackf. (Ind.) 405;
Miles v. Van Horn, 17 Ind. 245 (Ind.);
Kovacs v. Mayoras, 175 Mich. 582; 141 N. W. 662;
Kennedy v. Holladay, 25 Mo. App. 503;
Shipman v. Burrows, 1 Hall. (N. Y.) 399;
Blakeslee v. Hughes, 50 Ohio State 490; 34 N. E. 793;
Cooper v. Phipps, 24 Ore. 357; 33 Pac. 985;
Chubb v. Gsell, 34 Pa. 114;
Hall v. Elgin Dairy Co., 15 Wash. 542; 46 Pac. 1049.

In all of the foregoing cases, evidence of the good reputation of a plaintiff in a *libel action* (in which necessarily character was in issue) was held inadmissible in advance of an attack, and judgments in favor of the plaintiff were reversed for the reception of such evidence. As we have already stated, the reason for the exclusion of such evidence is a practical one. A

plaintiff who becomes a witness in his own case after having his reputation for "truth and veracity" vouched for by other people, secures an advantage over his adversary that cannot be measured. His testimony is given under a favorable atmosphere, that cannot but cause it to be measured by different standards than those by which the testimony of the other witnesses is measured.

Again, the only issue upon which proof of the party's good reputation in a libel action can legitimately bear is that of damages. But in a case where the defendant pleads justification or mitigation, it has been the practical experience of courts that a jury will consider proof of good reputation, not for the legitimate purpose for which it is introduced, but for the illegitimate and unlawful purpose of determining the truth of the charge and the motive of the defendant in publishing the charge. Evidence of good reputation of a party in a civil action is never admitted for the purpose of showing that the party was not guilty of the acts with which he is charged. But invariably juries consider such evidence when admitted as proof that a party did not and would not commit the acts charged against him in the alleged libelous article. It is because illegitimate use is made of such evidence by a jury that courts exclude it.

Unless the defendants impeach the good reputation of the plaintiff in a libel action or in any other action involving character, the plaintiff must stand upon the presumption of good character which the law affords. It is only when the defendant seeks to impeach the good

character of the plaintiff by direct evidence that the plaintiff may in rebuttal of such evidence introduce evidence of his good character. If by his pleadings and his proofs the defendant shows a disinclination to attack the reputation of the plaintiff, and as said in *Blakeslee v. Hughes,* supra, "expressly declines that issue", it is not fair to the defendant that the minds of the jury should be saturated with evidence that can be of no assistance to them but will inevitably bias and prejudice them against the defendant and render it difficult or impossible for them to calmly and dispassionately view the evidence introduced by the defendant in support of his pleas of justification and mitigation.

In the present case the defendants at no time sought to impeach the character or reputation of the plaintiff, either as a man or as an engineer. The reception of evidence of the plaintiff's good reputation therefore was prejudicially erroneous.

1. Evidence of the Plaintiff's Good Reputation Was Not Admissible as Tending to Show the Standing of the Plaintiff in His Profession.

In the trial court counsel for the plaintiff took the position, in opposing a petition for a new trial, that evidence of the plaintiff's good reputation was admissible as tending to show his high standing in his profession.

The position of counsel was that the evidence admitted called not for the reputation of the plaintiff as a man but for the reputation of the plaintiff "for the

truth and veracity of his reports as a consulting engineer", and therefore called for his *professional* standing as distinct from his *personal* standing. To this there are three answers: (1) the question is susceptible of no such construction; (2) evidence of the professional standing of the plaintiff was inadmissible under the pleadings, and (3) even though plaintiff's professional standing were in issue, he could not prove it by evidence of good reputation, in advance of an attack by the defendants. These propositions we will discuss in their order.

(a) *The evidence of good reputation in its nature could refer only to the "personal" as distinguished from the "professional" standing of the plaintiff.*

The question objected to called for the "general reputation of Taggart Aston in the engineering world, meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this county and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer (R. p. 179). To this question the witness answered "from all the information that I have been able to secure concerning Mr. Aston both in America and in Europe his reputation has been first-class" (R. p. 180).

It is hardly debatable that a question that asks for the reputation of an engineer for the *truth* and *veracity* of his reports calls for *personal* as distinguished from *professional* qualifications. A poor engineer may make

honest and truthful reports; conversely an efficient engineer may make dishonest and untruthful reports. The truth or the honesty of the reports can in nowise reflect the ability of the engineer making them. Truth, honesty or veracity of a person, whether he be a lawyer, a doctor or an engineer, are attributes that reflect upon him as a man, and therefore in a personal, not in a professional capacity. A question which calls for the reputation of a man for the "truth and veracity of his reports as a consulting engineer" does not in anywise or to any extent indicate the standing of an engineer in his profession; it merely calls for his reputation as a truthful and veracious man. Such evidence, therefore, was not admissible as tending to show the position and standing of the plaintiff in his profession. It does not in anywise tend to show the position or standing of the plaintiff in his profession. It is inherently limited to showing the reputation of the plaintiff for certain personal attributes common to all honest men, whether they be engineers or members of some other calling or profession.

The plaintiff in the present case was permitted, without objection, to testify to his technical education[34] and to the positions and the projects[35] with which he had been connected throughout his professional career. This evidence was allowed upon the theory that it tended to show the plaintiff's position in the world, under the rule laid down in *Turner v. Hearst,* 115 Cal. 394, and kindred cases. But as we have already pointed

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[34] R., pp. 172, 173.
[35] R., pp. 173, 174.

out, the evidence which is here the subject of consideration did not tend to show plaintiff's position in the world except by proof of reputation for certain personal attributes in nowise connected with his profession, and as we have already shown, proof of a good reputation for such personal attributes cannot be made by a plaintiff in advance of an attack by defendants.

(b) *Evidence of the plaintiff's position and standing in his profession was inadmissible under the pleadings.*

Plaintiff's position is that the evidence which is here the subject of consideration is admissible as tending to show his position in his profession, on the theory that the damage to the plaintiff in his profession would bear a direct ratio to the standing of the plaintiff in his profession. But the plaintiff, under the issues in the case, *was not entitled to any damage for injury to his profession.*

A plaintiff in a libel action may recover damages for injury to his occupation, business or profession in two cases only: (1) Where the libel reflects upon the plaintiff *in relation to his business, occupation or profession,* in which event the plaintiff may recover damages to his business, occupation or profession *without special pleading or proof of such damage;* and (2) Where a libel affects the plaintiff not in relation to his business, occupation or profession, but solely in a personal capacity, in which case the plaintiff may recover damages for injury to his business, occupation or profession, *but only where he specially pleads and proves*

such damage. In the first case, the libel directly attacks and directly affects the plaintiff in his occupation, and is held libelous *per se.* In the second case, the plaintiff is affected in his occupation indirectly, if at all, and the article is *not* libelous *per se;* he must therefore plead damage specially and prove it, as in all cases of alleged libels which are not libelous *per se.*

In some cases a libel may be aimed at a personal and a professional qualification of the plaintiff at the same time. A libel which in terms charges a lawyer with being dishonest, affects the subject of the libel both as a lawyer and as a man. It is libelous per se in both aspects. Accordingly, in such case the plaintiff may, *without special plea or proof,* recover damages that flow naturally from the libels (a) upon the plaintiff *as a man,* and (b) upon the plaintiff *as a lawyer.* It is obvious that in such a case the plaintiff being entitled to damages for injury to his profession, has a right to show the nature of the injury to his profession, and incidentally his standing in his profession. Such a case was *Turner v. Hearst,* 115 Cal. 394. In that case the plaintiff was an attorney. The complaint in the action was predicated upon a libel in a twofold capacity, to wit, upon the plaintiff (a) as an individual, and (b) as an attorney. The article complained of charged the plaintiff with dishonesty. The allegation of the complaint was that the defendant had published "of and concerning the plaintiff and of and concerning him in his capacity as an attorney at law" a certain libelous article. On the trial, evidence was admitted as to the extent of Turner's professional practice. With respect

to the admission of this evidence the court (speaking through Mr. Justice Henshaw, the same justice who wrote the opinion in *Davis v. Hearst*) said (p. 399):

> "It was not error for the court to allow proof of the extent of plaintiff's practice. Plaintiff was a lawyer engaged in the practice of his profession. The words of the publication being admittedly libelous per se, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. General damages, in an action where the words are libelous per se, are such as compensate for the natural and probable consequences of the libel, and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice."

This does not mean that proof of injury to occupation or profession may be given in every case of a libel which is libelous per se. It means that such evidence may be given where the libel is libelous per se *as affecting the plaintiff in his occupation or profession.* If a libel, even though libelous per se, reflects upon a plaintiff only in his personal capacity, evidence of injury to business or occupation can only be given where there has been a special plea of damage. In other words, injury to occupation or profession is included within the general class of damage which may be proved without special plea only where the libel is in terms aimed at the plaintiff in his business or professional capacity. The courts have at all times marked a distinction between libels which affect a person personally and those which affect him professionally.

See,

Harkness v. Chicago Daily News, 102 Ill. App. 162.

In this case a newspaper article was directed at the place of business of the plaintiff, and stated that said place of business was unsanitary and that people had become sick therein. The plaintiff charged in his complaint that this libel was "published of and concerning the plaintiff". The court held that

> "the plain reading of the declaration shows that this alleged libel is of and concerning the business of the plaintiff, that is, of the healthfulness of the goods made and sold by her".

But, as the court pointed out:

> "it is nowhere alleged that the libel is published of and concerning her business, trade or occupation";

and commenting thereon the court said:

> "Here is lacking an indispensable element of good pleading, for want of which the demurrer must be sustained."

See, also,

McDermott v. Union Credit Co., 76 Minn. 84; 78 N. W. 967, wherein it is said (p. 968):

> "It is possible that anything published in disparagement, however slight, of a person as an individual may incidentally affect him somewhat in his business or profession; but it does not necessarily follow that the words are actionable, per se, as published of and concerning him in relation to his profession or business. Any such rule would open the door for a flood of vexatious litigagation. To be actionable on that ground alone, the publication must be such as would naturally and directly affect him prejudicially in his profession or business."

Nowhere in the article complained of in the present case is there any statement, intimation or suggestion

that the plaintiff was an engineer or anything that linked the plaintiff's profession with the statements made concerning the plaintiff. The plain import of the article complained of is that the statements were made of the plaintiff personally and not in his capacity as an engineer. So, too, the complaint in the present case in terms alleges that the libel was published "of and concerning the plaintiff" (R. p. 55). So that not only does the language of the article not admit of a construction that it was aimed at the plaintiff as an engineer, but the plaintiff in his complaint expressly limits the libel as one aimed at him personally. Nowhere in the complaint is there any allegation of *special damage* to the plaintiff's profession, and upon the trial there was no proof of any damage to the plaintiff's profession. We say, therefore, that the plaintiff was not entitled to damages for injury to his profession, and consequently was not entitled to put in proof of his standing in his profession.

See,

Smedley v. Soule, 125 Mich. 192; 84 N. W. 63.

The case just cited may be said to be a leading case upon this subject. Its holdings are correctly summarized in the syllabi as follows (p. 65):

> "In an action for libel, plaintiff, in order to recover for damages in his profession must, in his declaration, connect the libel by the proper colloquium with his profession, and allege special damages.
>
> "Where no loss of business is shown, no damage can be recovered for injury to one's profession."

In the opinion it is said:

> "It is common in all actions for libel and slander for the plaintiff to allege not only his good name, etc., as a citizen, but also to allege his business or profession. And the mere fact that such occupation or business is stated in the declaration is not sufficient to justify the inference that the libelous or slanderous article was uttered with reference to his particular business or profession, especially in the absence of any allegation that he has suffered pecuniary loss in his profession or business, but has only suffered loss in his good name, fame, and credit. What is there in such a declaration to notify a defendant that plaintiff claims injury to his profession or business, or that he would show pecuniary loss without alleging any, or that a jury should be turned loose in a realm of speculation to guess what loss in that direction plaintiff has sustained. * * * All charges of disreputable or criminal conduct tend to injure every man in his profession, trade, or occupation; but the law does not permit recovery therefor unless the words be spoken of him in regard to such profession, trade, or occupation, and loss is alleged and proved. Every such plaintiff can recover for injury to feelings and damage to his reputation. If he desires to go beyond this, it is a wholesome rule to require him to connect the libelous charge by the proper colloquium with such profession, trade, or occupation, and to allege special damages."

See, also,

Stewart v. Codrington, 55 Fla. 327; 45 So. 809.

This case involved a newspaper article, libelous per se upon the plaintiff individually. It was held that for the injury suffered by him as an individual the plaintiff was entitled to damages without special plea or proof. But in the absence of special plea and proof the plaintiff could not recover damages for injury to his profession, there being no allegation in the complaint to show that the article was published concerning the

plaintiff in his professional capacity. The court says (p. 812):

> "This court has held that in libel any language published of a person that tends to degrade him, or bring him into ill repute, or to destroy the confidence of his neighbors in his integrity, or to cause other like injury, is actionable per se, and that in such cases it is not necessary to allege special damages. * * *
>
> "It is true, as contended, that there is no allegation in any count that the libelous matter was published of and concerning the plaintiff in his office as the judge of the criminal court of record, or as a solicitor or attorney, and we think such allegations are necessary in order to entitle the plaintiff to prove that he was libeled in such office or business. Saunders on Pl. & Ev. 915; Newell on Slander and Libel (2d Ed.) 700. He will be confined, therefore, to such damages as he may be able to prove he has sustained in his private character, outside of these considerations (13 Ency. Pl. & Pr. 38), as the declaration is broad enough to cover any such possible damages."

As bearing upon the question herein involved and showing that a plaintiff is not entitled to general damages for injury to professional business without allegation and proof that the libel was aimed at him in a business or professional as distinguished from an individual capacity, see the following cases:

Van Epps v. Jones, 50 Ga. 238;

Gilbert v. Field, 3 Caines (N. Y.) 329;

Barnes v. Trundy, 31 Me. 321;

Line v. Spies, 139 Mich. 484; 102 N. W. 993;

Sherin v. Eastwood, 27 So. Dakota 312; 131 N. W. 287;

Jones v. Bush, 131 Ga. 421; 62 S. E. 279;
Lewis v. Weidenfeller, 175 Mich. 296; 141 N. W. 649.

(c) *Even though the plaintiff were entitled under the pleadings to recover damages for injury to his profession, nevertheless he was not entitled to prove professional reputation in advance of an attack.*

Even though the plaintiff were entitled to recover damages for injury in his profession without special pleading or proof of such injury, nevertheless he was not entitled to prove his good professional reputation in advance of an attack by the defendant. In fact the rule which excludes evidence of good reputation of a plaintiff in a libel action until such reputation has been impeached by the defendants is not limited to *personal* reputation but extends to *professional* reputation as well.

See,

Burkhart v. North American Co., 214 Pa. 39; 63 Atl. 410.

This was a libel action in which evidence of the high professional reputation of the plaintiff as a musician was rejected and error was predicated upon the rejection of such evidence. In disposing of the assignment of error based upon this ground, the court said (p. 411):

"The first four assignments of error are to the rejection by the learned judge at the trial of offers to show the

> high professional reputation of the plaintiff as a musician. All the cases agree on the general rule that such evidence is not admissible until his reputation has been attacked."

To the same effect, see,

Howland v. Geo. F. Blake Mfg. Co., 156 Mass. 543; 31 N. E. 656,

where evidence of the plaintiff's business reputation was excluded in the trial court and the ruling affirmed on appeal.

It is true that in this case evidence of plaintiff's standing in his profession might be admissible to establish the measure of damages, but the plaintiff's standing and the damage suffered must be specially pleaded and proved, the allegation detailing, for example, the important work in which plaintiff had been engaged and the loss of clientele which he had suffered. But evidence of a plaintiff's *general professional reputation* is too vague, and moreover is inadmissible in advance of an attack upon it for the even more important reason that it would tend to the same abuses which have prompted courts to exclude evidence of a plaintiff's *general private reputation.* It is impossible to measure the weight which a jury might attach to general evidence of good standing, and courts reject it because of the dangerous influence such evidence might have upon a jury's determination, not alone of the damages but of the truth of the charge against the plaintiff. A jury might accept this evidence (although in advance of an attack upon

the plaintiff's reputation) to convince them that a person of such general professional reputation could not have been guilty of the acts charged against him. It is to obviate this danger of a jury's summary conclusion that courts reject altogether the arbitrary conclusion of a witness concerning the plaintiff's general standing in his profession, before it has been attacked.

In concluding this branch of the case, our position may be briefly summarized as follows:

(1) The evidence of plaintiff's good reputation "for the truth and veracity of his reports" admitted by the trial court in its nature concerned the plaintiff's *personal* as distinguished from his *professional* reputation and was inadmissible because the plaintiff's reputation was not attacked by the defendants;

(2) If it be claimed that the evidence of plaintiff's good reputation admitted by the trial court dealt with his professional reputation as distinguished from his personal reputation, such evidence was inadmissible for two reasons: (a) Under the pleadings the article complained of, not being a libel upon the plaintiff professionally, the plaintiff could not recover any damages for injury to his profession without a special plea and proof of such damages; and (b) Even though the plaintiff were entitled to recover damages for injury to his profession, nevertheless evidence of good *professional* reputation was not admissible in advance of an attack.

B. THE COURT ERRED IN ADMITTING IN EVIDENCE ARTICLES THAT APPEARED IN VARIOUS NEWSPAPERS THROUGHOUT THE UNITED STATES ON JULY 7 AND JULY 8, 1913, AND CONTAINED EUGENE J. SULLIVAN'S CHARGES OF POLITICAL BIAS AGAINST SAN FRANCISCO'S ENGINEERS IN THE HETCH-HETCHY MATTER AND OF THE SUPPRESSION OF THE BARTELL REPORT.

Over the objection of the defendants, the court admitted in evidence copies of (a) the Arizona Gazette of July 7, 1913; (b) the Evening World-Herald of Omaha, Nebraska, of July 7, 1913; and (c) the Herald-Republican of Salt Lake City, of July 8, 1913. All of these papers contained articles setting forth the charges of political chicanery, bias and suppression of the Bartell report which were made by Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, in his testimony on July 7, 1913, before the Committee on Public Lands of the House of Representatives. The reception of these articles in evidence is the basis of Exceptions 42, 43 and 44, and is dealt with in Assignments of Error Nos. 34 to 36, inclusive, hereinbefore set forth.

It is difficult to perceive the theory upon which this evidence was received. The fact that Eugene J. Sullivan in July, 1913, made against the City Engineer of San Francisco and other public officials charges of political bias and chicanery and suppression of evidence could in no degree tend to prove that the newspaper article published six months later, on December 2, 1913, was either false or libelous. It could in no wise tend to prove that the plaintiff had been damaged. In short, the evidence had no legitimate bearing upon any issue

in the case. The fact that for six months prior to the time that the defendants took him to task for his careless statements of political bias and chicanery and suppression of evidence Sullivan had been making such statements in no wise tended to illuminate the minds of the jury with respect to any of the matters involved on the trial. The evidence, however, did have an illegitimate purpose, which it probably served. The plaintiff, by showing that the charges made by Sullivan in July, 1913, were published throughout the United States sought to persuade the jury to believe that the alleged libelous article of December 2, 1913, had circulated in the same places and that thereby the damages of the plaintiff were enhanced. By proving that Sullivan's charges made in July, 1913, were matters of great notoriety, the plaintiff sought to make the jury believe that the alleged libel upon which the action was brought was a matter of equal notoriety. By proving that the charges made by Sullivan had created great public interest in many places in the United States, the plaintiff sought to arouse the belief that the alleged libelous article had aroused a similar interest in the same places. In this manner, the plaintiff covertly attempted to influence the jury and to enhance his damages.

The defendants, of course, were in no wise bound by publications in other newspapers six months before the publication made by the plaintiff. The defendants were not at all responsible for the publications made in other newspapers in July, 1913, and, in addition, the publications of July, 1913, were the self-serving declarations of Sullivan himself, which could in no wise bind

the defendants. It surely could not be claimed that because Sullivan as early as July, 1913, had made charges of the suppression of the Bartell report and of political bias of the engineers of San Francisco in favor of Hetch Hetchy, these charges published in the public press were evidence of these facts.

Had the publications in other papers occurred *after* the article of December 2, 1913, which is the subject of this action, they would not have been admissible because not the direct and proximate result of that publication.

See:

Carpenter v. Ashley (1906), 148 Cal. 422; 83 Pac. 444;

McDuff v. Detroit Evening Journal Co. (1890), 84 Mich. 1; 47 N. W. 671; 22 Am. St. R. 693;

Clark v. North American Co. (1902), 203 Pa. 346; 53 Atl. 237.

McDuff v. Detroit Evening Journal Co., supra, was a libel action.

The trial court admitted in evidence a copy of the Omaha Journal in which was an editorial containing many of the charges which were the subject of the suit. The plaintiff had received a copy of the Omaha Journal in a letter from his brother. The letter was received in evidence in connection with the paper itself. Subsequently both were stricken out upon motion of the defendant. In holding that the original reception of the evidence was error, and that such error was not cured

by the subsequent striking out of the evidence, the court says:

> "Plaintiff showed no connection between the publication in the Journal and the article in the Omaha Herald, which appeared under the editorial column of that paper, and not as a piece of news obtained from another publication. That article and the letter were clearly inadmissible. The jury very likely presumed that the article in the Omaha Herald was based upon the article in the Journal, but there was no evidence of the fact. Error in admitting such testimony is not cured by striking it out. There may be cases where courts may well say that the jury could not be prejudiced by the admission of incompetent testimony when it is stricken out. In such case it would be error without prejudice, and judgment would not be reversed for that reason. But we cannot apply such ruling to the present case, where the inevitable result of the evidence would be so injurious to defendant."

In *Clark v. North American Co.,* supra, it was held that accounts of the same transaction in other newspapers were inadmissible in a libel action against a newspaper publisher. The court said:

> "All the assignments in reference to the accounts of the same transaction in other newspapers are sustained. Such accounts were not admissible in evidence for any purpose."

See also *Bigley v. The National Fidelity & Casualty Co.,* 94 Neb. 813; 144 N. W. 810. In this case it was held to be erroneous to receive in evidence in a libel action independent publications in other newspapers.

A fortiori, publications six months *before* the date of an alleged libelous article are inadmissible for any purpose.

The evidence, as we have before pointed out, had no legitimate bearing upon any issue involved in the case. It was calculated, however, to play an illegitimate purpose and to lead the jury to believe that the article complained of containing charges against the plaintiff had circulated to the same extent and in the same places as the articles containing Sullivan's charges published six months before. This, however, is neither a fair nor a reasonable inference. To what extent this evidence affected the jury in their deliberations we, of course, cannot determine. It was introduced by the plaintiff for the purpose of affecting the jury and, no doubt, did affect them. It was calculated to show a wide circulation of the alleged libelous article by unfair and unreasonable inferences and thereby to enhance the damages of the plaintiff. We submit that its reception was clearly erroneous and prejudicial.

C. EVIDENCE WAS ERRONEOUSLY ADMITTED THAT A REPORT MADE BY THE WITNESS GRUNSKY ON THE RUN-OFF FROM ALAMEDA CREEK HAD BEEN TURNED IN LATE TO THE BOARD OF ARMY ENGINEERS.

In their letters and telegrams to Congress, the plaintiff and Sullivan claimed that a report prepared by Assistant City Engineer Bartell had not been delivered to the Board of Army Engineers. It was their contention that such report was not delivered for the reason that it was favorable to the contentions of the Sierra Blue Lakes Water and Power Company and showed that the Hetch Hetchy rights sought by San Francisco were unnecessary.

This was the only report claimed by the plaintiff or by Sullivan in their letters and telegrams to Congress to have been suppressed. Upon the alleged suppression of this report alone did the plaintiff and Sullivan rest their charge of public scandal in the suppression of reports.[36] Because of the charge of the suppression of this report alone did the defendants accuse the plaintiff and Sullivan of having made gross and careless aspersions upon the City Engineer. Yet, upon the trial the plaintiff, over the objection of the defendants, was permitted to prove that a report made by the witness Grunsky on the run-off of Alameda Creek was not turned in to the Board of Army Engineers until October or November, 1912.[37]

The admission of this evidence forms the basis of Exceptions 48 and 49, and is dealt with in Assignments of Error Nos. 38 and 39, hereinbefore set forth.

This report had no bearing at all upon the Mokelumne River source of supply or upon the properties of the Sierra Blue Lakes Water and Power Company. It had nothing to do with the charges made by the plaintiff of suppression of reports. It was made by Mr. Grunsky at the request of Mr. Freeman and was addressed to Mr. Freeman.[38] It was for his information, in connection with his work, and was probably a check upon the claims made by the Spring Valley Water Company as to the amount of water available in Alameda Creek. In fact, Mr. Freeman was of the opinion that the claims of the Spring Valley Water Company with

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[36] R., p. 126.
[37] R., p. 370.
[38] R., p. 369.

respect to the total output of water at this source was exaggerated,[39] and had Mr. Grunsky, in connection with other engineers, make a report. The report, as it turned out, was not at great variance with the claims of the Spring Valley Water Company.[40] The claims of the latter company and the evidence in support of them were well known to the Board of Army Engineers. In fact that company was represented at Washington in the Hetch Hetchy hearings, and it was upon the suggestion of its counsel that the Grunsky report on Alameda Creek was delivered to the Secretary of the Interior and by the latter to the Board of Army Engineers.[41]

The only effect, therefore, of the evidence that a report made by Mr. Grunsky, not at great variance with the data already before the Board of Army Engineers, was not delivered to that board, was to prejudice the jury and make them believe that the city was actually suppressing evidence. At the time of the trial Mr. Freeman was at his home in Providence, Rhode Island.[42] No suggestion had been made prior to the trial that any report other than the Bartell report had been suppressed. The complaint alleged in terms the suppression of the Bartell report[43] but contained no allegation of the suppression of any other report.

Upon the close of the trial, in rebuttal, the plaintiff was permitted to show that on November 25, 1912, at the hearing of the order to show cause before the Secretary of the Interior in Washington, Mr. Mc-

[39] R., p. 371.
[40] R., p. 373.
[41] R., p. 385.
[42] R., p. 387.
[43] R., p. 126.

Cutchen, representing the Spring Valley Water Company, had complained to the Secretary of the Interior that a report on the Alameda Creek had been made by Mr. Grunsky and that he had never been permitted access to it; that the Secretary of the Interior asked Mr. Freeman if there was such a report, and the latter then handed over the report, saying that it was the only copy he had but that he was willing to turn it over to the Secretary of the Interior and to the Board of Army Engineers.[44]

As above stated, no intimation was contained in anything that transpired prior to the commencement of the action, or in anything in the complaint, that a claim would be made of the suppression of a report other than the Bartell report. At the time of the trial, Mr. Freeman, who alone could have explained the reasons why the report on the Alameda Creek was not delivered to the Board of Army Engineers, was at his home in Providence, Rhode Island.[45]. The last testimony, therefore, that went before the jury had to do with the alleged suppression of a second report as to which there was no intimation or suggestion in the pleadings or in statements prior to the action. The obvious purpose of this testimony was to bias and prejudice the jury and make them believe that the charges of political bias and chicanery and suppression of evidence made by Sullivan and the plaintiff were true.

The only charge in the article complained of to which this evidence could be claimed to be at all re-

[44] R., p. 386.
[45] R., p. 387.

sponsive was the charge that the plaintiff had made gross and careless aspersions upon the City Engineer, but this arraignment of the plaintiff, as we have already shown, was the outgrowth of his charge that the Bartell report had been suppressed. It was not based upon any other charge of suppression. In fact, the plaintiff had never made any other charge of suppression. If the Hyde-Marx-Grunsky report on Alameda Creek had been suppressed, that circumstance would in no degree tend to prove that the Bartell report had been suppressed, nor would it illumine the motive of the plaintiff in his charge that the Bartell report had been suppressed. There is no evidence in the record to show that, at any time while they were making the charges of suppression of evidence and of political bias and chicanery, Sullivan or the plaintiff knew of the existence of the Hyde-Marx-Grunsky report or of the fact that it had been delivered late to the Board of Army Engineers. Without proof of the fact that the plaintiff knew of the existence and late delivery of the Hyde-Marx-Grunsky report at the time he made the charges of the suppression of the Bartell report and that he was influenced in making the charge of suppression of the latter report by reason of his knowledge of the existence and alleged suppression of the former, evidence of such alleged suppression was inadmissible for any purpose.

The only issue between the plaintiff and the defendants growing out of the suppression of any reports was whether the plaintiff had made gross and careless aspersions upon the City Engineer in charging the sup-

pression of the Bartell report. If the plaintiff was grossly negligent in charging the suppression of the Bartell report it would not avail him to prove that another report had been suppressed. If, at the time he made the charge of the suppression of the Bartell report, the plaintiff knew of the suppression of another report, it might be claimed that the fact of the suppression of the latter report *coupled with the plaintiff's knowledge of its suppression* would tend to prove the good faith of the plaintiff in making the charge of the suppression of the Bartell report and would be some evidence in reply to the charge that he had grossly and carelessly made aspersions upon the City Engineer in charging the suppression of the Bartell report. But, in the absence of any evidence that the plaintiff knew of the existence of the Hyde-Marx-Grunsky report or of its alleged suppression at the time that he made his charges of the suppression of the Bartell report, such evidence was utterly inadmissible.

The defendants had charged the plaintiff with making "gross and careless aspersions" upon the City Engineer in charging the suppression of the Bartell report. The plaintiff was entitled to disprove this charge by evidence that the charge was reasonably made after investigation and in good faith; but the fact that another report, of the existence of which the plaintiff was ignorant at the time, had been suppressed, if such were the fact, would in no wise tend to show that the plaintiff had acted in good faith or upon reasonable grounds in charging the suppression of the Bartell report.

Again, as we have already pointed out, Mr. Freeman, who alone could explain the reasons why the Grunsky report on Alameda Creek was not delivered to the Board of Army Engineers, was in Providence, Rhode Island,[46] at the time when the charge was first made that this report had been suppressed. We do know from Mr. Grunsky that the report did not differ materially from the claims of the Spring Valley Water Company, with which the Board of Army Engineers were familiar.[47] This probably explains why the report was not delivered to the Board of Army Engineers. The report was made, according to Mr. Grunsky, for the enlightenment of Mr. Freeman[48] and as a check upon the claims of the Spring Valley Water Company.[49]

The report having developed the fact that the claims of the Spring Valley Water Company were probably correct, there was no reason why the report should have been delivered to the Board of Army Engineers, but the fact that it was not delivered carried with it the insidious suggestion that there had been a deliberate suppression of evidence and, coming as it did at the close of the case, undoubtedly prejudiced the jury and led them to believe that the charges made by the plaintiff of political chicanery and prejudice of San Francisco's engineers and of their suppression of evidence were correct.

The evidence being inadmissible upon any theory of the plaintiff's case, its reception was erroneous and, for the reasons we have pointed out, was prejudicial.

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[46] R., p. 387.
[47] R., p. 373.
[48] R., p. 369.
[49] R., p. 371.

D. THE COURT ERRED IN ADMITTING EVIDENCE OF STATEMENTS MADE BY THE PLAINTIFF AT A MEETING OF THE CIVIC CENTER LEAGUE HELD IN THE ST. FRANCIS HOTEL ON NOVEMBER 5, 1913, ALMOST A MONTH BEFORE THE PUBLICATION OF THE ARTICLE COMPLAINED OF.

Upon the trial three witnesses testified that on November 5, 1913, at a meeting of the Civic Center League held in the St. Francis Hotel, San Francisco, the plaintiff made a statement in which he charged the suppression of the Bartell report and charged bias and discrimination on the part of San Francisco's engineers against the properties of the Sierra Blue Lakes Water and Power Company and in favor of the Hetch Hetchy project. These witnesses were Eugene J. Sullivan,[50] Clement H. Miller[51] and the plaintiff himself.[52] The admission of this testimony is the basis of Exceptions Nos. 9, 10, 11, 25, 33, 35 and 36, and is dealt with in Assignments of Error Nos. 5, 6, 7, 20, 25, 27 and 28.

In addition to and in connection with the evidence thus erroneously admitted the court admitted in evidence over the defendants' objections a copy of the San Francisco Examiner of November 6, 1913,[53] which purported to give an account of the proceedings of the Civic Center meeting of November 5, 1913. The purpose of the latter evidence was to show that the plaintiff was not mentioned in the Examiner article, nor were any of his statements reported. The admission of the latter evidence forms the basis of Exception No. 34, and is dealt with in Assignment of Error No. 26.

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[50] R., p. 165.
[51] R., p. 182.
[52] R., p. 263.
[53] R., p. 259.

We submit that this evidence was erroneously admitted.

In discussing the question, we shall first deal with the statements made by the plaintiff at the meeting, and secondly with the Examiner's report of the proceedings at the meeting.

(1) Evidence of the statements made by the plaintiff at the Civic Center League meeting of November 5, 1913, was not admissible.

As we have frequently pointed out, the issue between the plaintiff and the defendants was as to the truth of the charge that the plaintiff had made gross and careless aspersions upon the engineers representing San Francisco in the Hetch Hetchy matter. Any evidence tending to prove either the truth or the falsity of this charge was admissible. Unless the evidence tended to prove either the truth or the falsity of such charge it was inadmissible.

Upon what theory could the plaintiff prove that a month before the publication of the articles of which he complained he had reiterated the charges that he had been making since the preceding June? The fact that the plaintiff during all of the time between June and November was reiterating his charges of suppression of evidence and of political bias against the engineers representing San Francisco would not tend to prove the good faith of the plaintiff in making the charges, nor would it tend in any degree, however remote, to prove the charges. The self-serving declarations of the plaintiff at the Civic Center meeting of

November 5, 1913, could not prove either the good faith of the plaintiff or the truth of the statements which he made.

The theory of counsel for the plaintiff on this matter seems to have been that the evidence was admissible because representatives of San Francisco were present, notably the City Attorney[54] and the City Engineer,[55] and they made no reply to the charges made by the plaintiff, save that, in response to the charge that a report made by Mr. Bartell had been suppressed, the City Engineer responded that Mr. Bartell was merely one of one hundred and fifty assistants.[56] But, could the failure of the city officials to reply to a charge made by the plaintiff a month prior to the publication complained of bind the defendants in the present action? The sole matter in issue in this connection was the truth or falsity of the statements made by the defendants in the publication of December 2, 1913. The truth or falsity of such statements could not be determined by the failure of the city officials a month before to reply or answer charges made by the plaintiff. A person cannot make indiscriminate charges against another and, when taken to task for it by a third person, endeavor to sustain his charges by proof that the person against whom they were aimed had ignored them.

The statements made by the plaintiff at the Civic Center meeting were purely self-serving. They illustrated no issue in the present case and served no

[54] R., p. 163.
[55] R., p. 163.
[56] R., pp. 165-166.

legitimate purpose. They were obviously intended to influence the jury by having them draw the inference that the city officials present at the Civic Center meeting had admitted the charges made by the plaintiff, because of their failure to reply to them. Such inference, however, is an illegitimate one and could in nowise answer any question existing, *not between the city officials and the plaintiff,* but *between the plaintiff and the defendants* in the present action. Were the issue between the plaintiff and the City of San Francisco, or its officials, failure of the latter to reply to a charge of the plaintiff, might be some evidence of the truth of the charge. But the silence of the city officials in the face of the plaintiff's charge, would bind them, alone. It would be neither binding nor admissible against anyone else.

(2) The Examiner article of November 6, 1913, which purported to show the proceedings of the Civic Center meeting of the previous day was improperly admitted in evidence.

Having shown that the plaintiff made certain statements at the Civic Center meeting of November 5, 1913, the plaintiff then offered and there was received in evidence an article published in the San Francisco Examiner of November 6, 1913.[57] This article purported to show the proceedings at the Civic Center meeting on the previous day. In it no mention is made of the plaintiff or of the statements made by him. It is because of the failure of the article to mention the

[57] R., p. 259.

plaintiff or to report his statements that counsel for the plaintiff claims that the article was admissible.[58]

Upon what issue in the case, we ask, did this evidence tend to cast light? Surely, not the good faith of the plaintiff, because it was an act of the defendants. Surely, not the truth of the statements made by the plaintiff.

There remains but one other issue upon which it could be claimed to be admissible; that is, the issue of malice. The plaintiff, having charged that the publication complained of was actuated by malice, was entitled to introduce any evidence that legitimately tended to show malice on the part of the defendants.

Was the failure to report the statements made by the plaintiff at the Civic Center meeting any evidence of malice? The plaintiff, according to his testimony, had charged the suppression of the Bartell report. He had charged the City Engineer and other engineers representing San Francisco in the Hetch Hetchy matter with political bias and with having discriminated unjustly in favor of Hetch Hetchy and against other properties. Are the defendants to be charged with malice because they failed or refused to permit their columns to be used for the dissemination of the abusive charges made by the plaintiff? If a person over a course of months makes false charges against city officials, is the failure of a newspaper to publish those charges to be regarded as evidence of malice in a libel action subsequently brought against it for having arraigned the maker of the charges for making such charges?

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[58] R., p. 258.

The very publication complained of arraigns and takes the plaintiff to task for making the kind of charges that he made at the Civic Center meeting. The defendants in the publication of December 2, 1913, charged the plaintiff with making gross and careless aspersions upon the City Engineer and other engineers representing San Francisco. The plaintiff, having brought suit against the defendants for publishing such an article, now claims that the article was actuated by malice because the defendants throughout the months preceding the publication of the article complained of had failed to permit the use of columns of their newspaper to give currency to the very charges for the making of which they arraigned him in the publication complained of.

The defendants, by charging the plaintiff with making gross and careless aspersions upon the City Engineer and other engineers, sufficiently indicated that they believed his charges to be unjustified and false. Under such circumstances, can their failure to publish and give currency to his charges be held to be evidence of malice? We submit that it cannot, and, since this theory is the only possible one upon which the evidence would be admissible, we say that its admission was erroneous.

E. THE COURT ERRED IN ADMITTING TESTIMONY OF THE WITNESS WILLIAM J. WILSEY TO THE EFFECT THAT THE PLAINTIFF WAS IN HIS EMPLOY AND THAT NO REPORTS MADE BY THE PLAINTIFF TO THE WITNESS WERE FOR THE PURPOSE OF SELLING THE PROPERTIES OF THE SIERRA BLUE LAKES WATER AND POWER COMPANY TO SAN FRANCISCO BUT WERE FOR USE EXCLUSIVELY IN SELLING SAID PROPERTIES IN EUROPE, AND THAT THIS FACT WAS KNOWN BY THE PLAINTIFF.

The witness William J. Wilsey, over the objection of the defendants, was permitted to testify that he employed the plaintiff in or about May, 1913, to make an engineering report upon the properties of the Sierra Blue Lakes Water and Power Company in connection with a hydro-electric and irrigation project; and that the plaintiff made two reports—a preliminary and a supplemental report.[59] The witness was further permitted to testify that he had never offered the properties for sale to the City of San Francisco,[60] but that the plaintiff's reports were obtained by him for use exclusively in offering said properties for sale in Europe,[61] and that the properties were offered for sale in Europe;[62] that the plaintiff knew the parties in Europe with whom the witness was negotiating for the sale of said properties,[63] and further knew that said parties were figuring on using the properties for hydro-electric and irrigation purposes.[64]

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[59] R., p. 176.
[60] R., p. 176.
[61] R., pp. 176-177.
[62] R., p. 177.
[63] R., p. 178.
[64] R., p. 178.

The reception of this evidence is the basis of Exceptions 12 to 20, inclusive, and is dealt with in Assignments of Error Nos. 8 to 16, inclusive.

We submit that this evidence was inadmissible. The charge that the plaintiff and Sullivan were engaged in a scheme to deprive San Francisco of its Hetch-Hetchy privileges with the object and purpose of compelling it to purchase the properties of the Sierra Blue Lakes Water and Power Company could not be answered by evidence that the witness Wilsey was not engaged in such a scheme. The motives of Wilsey and his purposes or intentions with reference to the properties of the Sierra Blue Lakes Water and Power Company are utterly immaterial. The record shows that the plaintiff and Sullivan were doing their utmost to defeat a grant by Congress to San Francisco of privileges in the Hetch Hetchy Valley. The record further shows that they were doing this with the knowledge that, if successful, San Francisco would probably be compelled to purchase the properties of the Sierra Blue Lakes Water and Power Company as the next best source of supply.[64a] In fact it was the *avowed* purpose of Sullivan to defeat the Hetch Hetchy privileges so that his properties might be sold to San Francisco.[65] During all of the time that the campaign against the Hetch Hetchy privileges was being waged in Congress by the plaintiff and by Sullivan *they both knew that the option for the sale of the properties executed to Wilsey was for but three months.*[66] What Wilsey would or might have done

[64a] R., p. 269.
[65] R., pp. 155-156.
[66] R., p. 244.

with the properties had he purchased them could throw no light upon the purpose of the plaintiff and of Sullivan, who knew that Wilsey's option was but for three months, and probably proceeded upon the theory that the option would not be exercised.

It was proper for the plaintiff to testify directly as to what he intended to do with the properties and what his object and purpose was in making his representations to Congress. It was not legitimate or proper for the plaintiff to show *his* motives and purposes *by proof of the motives and purposes of Wilsey.* We submit that the evidence was clearly inadmissible.

F. THE COURT ERRED IN ADMITTING EVIDENCE OF THE AMOUNT OF MONEY EXPENDED ON THE PROPERTIES OF THE SIERRA BLUE LAKES WATER AND POWER COMPANY AND OF THE FACT THAT THAT COMPANY HAD GIVEN OPTIONS FOR THE PURCHASE OF ITS PROPERTIES, FOR WHICH A CONSIDERABLE CONSIDERATION HAD BEEN PAID.

During the examination of the witness Eugene J. Sullivan, President of the Sierra Blue Lakes Water and Power Company, the court, over the objection of the defendants, permitted the witness to testify that he had expended on the company's water properties in construction and in other works about $100,000;[67] that he considered that it was necessary to obtain such moneys from time to time in order that the properties be maintained for the bondholders and stockholders of the company;[68] that he considered the properties of suffi-

[67] R., p. 153.
[68] R., p. 153.

cient value to justify the payment of heavy interest charges and the making of heavy sacrifices in order to preserve them.[69] The witness further testified that during the time he was president of the company options had been given for the purchase of the properties for which a considerable consideration was paid.[70] The reception of this evidence forms the basis of Exceptions Numbers 3 to 6, inclusive, and is dealt with in Assignments of Error Nos. 1 to 4, inclusive.

We submit that such evidence was inadmissible. The fact that the witness had expended the sum of $100,000 to conserve the properties of the Sierra Blue Lakes Water and Power Company did not illustrate any issue in the case; nor did the fact that he felt the properties to be of sufficient value to justify the making of great sacrifices, or the payment of heavy interest charges, tend to prove any issue in the case. Surely the fact that the witness had expended the sum of $100,000 on the properties of the company did not prove or tend to prove the falsity of the charge that Sullivan was engaged in a "scheme" which the article complained of had charged as a gross fraud, to wit, the "scheme" of depriving San Francisco of Hetch Hetchy rights in order that she would be compelled to purchase the properties of the Sierra Blue Lakes Water and Power Company.

The evidence shows that while the witness and the Sierra Blue Lakes Water and Power Company were willing to sell their properties to private individuals

[69] R., pp. 153-154.
[70] R., p. 154.

for $1,500,000[71] they were endeavoring to defeat the Hetch Hetchy privileges sought by San Francisco, thereby compelling San Francisco to purchase their properties, which they were offering to San Francisco for $6,000,000.[72] The evidence shows, therefore, that while Eugene J. Sullivan and his company were willing to sell their properties to private individuals for $1,500,000 they were not only holding the price to San Francisco *at four times that sum* but were endeavoring to *compel* San Francisco to purchase the properties by defeating the grant of the alternative rights in the Hetch Hetchy Valley.

We submit that the evidence of the amount of money expended by Sullivan upon the properties of the Sierra Blue Lakes Water and Power Company, and the fact that he considered the properties of sufficient value to make such expenditure, and had received considerable sums for options upon the properties was not relevant to any matter in controversy and should have been excluded.

G. THE COURT, AS AGAINST THE DEFENDANT WILLIAM RANDOLPH HEARST, ERRED IN ADMITTING IN EVIDENCE COPIES OF THE SAN FRANCISCO EXAMINER OF NOVEMBER 30, 1913, AND DECEMBER 1, 1913, WITH RESPECT TO THE PROPOSED WASHINGTON EDITION OF SAID SAN FRANCISCO EXAMINER.

The court admitted in evidence copies of the San Francisco Examiner of November 30 and December 1, 1913, in each of which statements were made concern-

[71] R., p. 269.
[72] R., p. 269.

ing the proposed Washington edition of that paper to be published on December 2, 1913. Among other things it was stated in these articles that the special Washington edition would be under the personal supervision of William Randolph Hearst. Similar statements tending to connect Mr. Hearst with the publication of the proposed special edition were also contained in these articles. The admission of this evidence forms the basis of Exceptions Nos. 38, 39 and 40, and is dealt with in Assignments of Error Nos. 30 to 33, inclusive.

The purpose of this evidence was to connect the defendant Hearst with the alleged libelous publication. The theory of the plaintiff, expressed in his complaint, is that the defendant Hearst was the "Managing Editor in charge of"[73] the publication complained of.

There is, however, an utter absence of proof that the defendant Hearst was connected in anywise with the publication. There is no evidence to show that he had anything to do with the publication which is the basis of this action. The statements appearing in the San Francisco Examiner prior to the publication complained of were, therefore, as to him, inadmissible hearsay. The declarations of the owner of the Examiner, to wit, the Examiner Printing Company, would not bind any one but the maker of those statements. As against the defendant Hearst the statements were incompetent, hearsay and inadmissible.

As we stated in the outset of this brief, we are not claiming that the evidence was insufficient to support the verdict. On the part of the defendant Hearst,

[73] R., p. 55.

we could, if so minded, successfully make such claim. Not only is the evidence *insufficient* to justify a verdict against him but there is *no* evidence tending in anywise to connect him with the publication complained of. The fact, however, that a verdict was rendered by the jury against the defendant Hearst in spite of an utter absence of evidence connecting him with the publication complained of, illustrates in a striking way the danger of admitting incompetent or irrelevant evidence and lends point and perspective to the propositions which we have heretofore discussed relative to the admission of other testimony. The only evidence before the jury tending to prove that the defendant Hearst had anything to do with the publication complained of was the inadmissible hearsay of his codefendant contained in articles preceding the publication which is the basis of this action.

Aside from this evidence, as to which there can be no doubt that error was committed in its reception, the record contains nothing that would even, in a remote way, connect the defendant Hearst with the publication of the alleged libelous article. The admission of such evidence is sufficient of itself to warrant a reversal of a judgment against the defendant Hearst. And, as we have already pointed out, the effect of such evidence in bringing about a verdict against the defendant Hearst illustrates the argument which we have been making that the jury were led astray by irrelevant and incompetent testimony, and led to bring in a verdict

which they might not, and probably would not, have brought in if such evidence had been excluded.

H. THE COURT ERRED IN ADMITTING IN EVIDENCE COPIES OF CERTIFICATES FILED WITH THE POST OFFICE AUTHORITIES SHOWING THAT THE DEFENDANT HEARST IS THE ONLY PERSON OWNING MORE THAN ONE PER CENT OF THE STOCK OF VARIOUS NEWSPAPERS IN THE UNITED STATES.

The court admitted in evidence, over the objection of the defendants, certified copies of various certificates filed with the Postmaster General of the United States, in accordance with an Act of Congress, stating the persons owning more than one per cent of the stock of corporations publishing various newspapers. The certificates so admitted showed that the defendant William Randolph Hearst is connected with the following named papers: "The San Francisco Examiner of San Francisco, California", "The Los Angeles Examiner of Los Angeles, California", "The Atlanta Georgian of Atlanta, Georgia", "The Chicago Evening American of Chicago, Illinois", "The Boston American of Boston, Massachusetts", and "The New York Evening Journal of New York, New York".[74] The reception of this evidence forms the basis of Exception No. 47 and is dealt with in Assignment of Error No. 37.

The purpose for which the evidence was offered, as stated by counsel for the plaintiff, was that "it may have some bearing on what I shall desire to do in

[74] R., p. 320.

calling other witnesses to prove the direct connection between the defendant Hearst and this publication''.[75]

As we have already shown, no direct or any connection was shown between the defendant Hearst and the publication complained of. Evidence showing that the defendant Hearst was a stockholder in the defendant corporation in nowise tended to prove that he was directly or even remotely connected with the publication complained of. The newspaper in which the publication was made is owned and operated by a corporation,—The Examiner Printing Company, one of the defendants herein. It need not be argued that that corporation is a legal entity distinct from its stockholders. The mere fact that the defendant Hearst was on owner of stock in the defendant corporation in no way tended to show that he was connected with the publication. The plaintiff recovered judgment against the defendant corporation; necessarily as a stockholder of the defendant corporation the defendant Hearst must bear his proportion of the loss suffered through the payment of any judgment that the plaintiff may recover. But the fact that he is a stockholder, even a heavy stockholder in the defendant corporation does not make him liable upon any theory of original liability. The evidence was offered, as stated by counsel for plaintiff, for the purpose of showing the connection between the defendant Hearst and the publication complained of. It does not in anywise tend to show that fact. We submit that its reception was erroneous and prejudicial, particularly as against the defendant Hearst.

[75] R., p. 319.

IV.

CONCLUSION.

In view of the foregoing considerations we respectfully submit that the judgment herein should be reversed.

Dated, San Francisco,
March....., 1916.

Respectfully submitted,

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JOHN J. BARRETT,
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Of Counsel.

No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

JACOB M. BLAKE,
Attorney for Defendant in Error.

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Statement.

This is an action for *malicious* libel. For a great number of years and during the successive terms of office of a number of Secretaries of the Interior, or as far back at least as the period of incumbency of Secretary Hitchcock, the City of San Francisco had made repeated and futile efforts to obtain from the Department of the Interior a franchise or right of way for a dam-site and reservoir privilege in the Hetch Hetchy Valley in the High Sierra Mountains in California for use as a source of domestic water supply. The Hetch Hetchy Valley is in what is known as the Upper Catchment basin of the Tuol-

umne River. In 1908 the then Secretary of the Interior (Mr. Garfield) issued a permit entitling the city to impound water in that catchment by first developing the drainage area tributary to Lake Eleanor and Cherry Creek, and second, after a full development of these sources, to utilize the Hetch Hetchy site (Trans. pp. 98, 99). In 1910 Secretary Ballinger caused a show cause order to be issued and served upon the city requiring it to show "why the Hetch Hetchy Valley should not be eliminated from said permit" (referring to the Garfield permit) and the order was made returnable on or before May 1, 1910. On May 27, 1910, an order of continuance was made by the Secretary which, among other things provided as follows:

> "Said continuance and postponement is granted for the purpose of enabling said City and County of San Francisco, to furnish necessary data and information to enable the Department of the Interior to determine whether or not the Lake Eleanor basin and watershed contributary, or which may be made contributary thereto, together with all other sources of water supply available to said city, will be adequate for all present and reasonably prospective needs of said City of San Francisco and adjacent bay cities without the inclusion of the Hetch Hetchy Valley as a part of said sources of supply and whether it is necessary to include said Hetch Hetchy Valley, as a source of municipal water supply for said City and County of San Francisco and bay cities.
>
> "In granting said postponement and continuance it is understood said City and County of San Francisco will at once proceed, at its own expense and with due diligence, to secure and furnish to said Advisory Board of Army Engi-

> neers all necessary data upon which to make the determination aforesaid, and pending the hearing upon said order to show cause, no attempt shall be made by said city or any of its officers or agents to acquire, as against the United States, any other or different rights to the Hetch Hetchy Valley than it now has under said permit, and that no effort shall be made by said city to develop said Hetch Hetchy Valley site'' (Trans. pp. 107-108).

Prior to this time and at the request of Secretary Ballinger, the War Department had detailed three army engineers to advise and report to the Secretary of the Interior concerning the data that should be furnished in connection with the city's application to be allowed a full franchise for the use of the Hetch Hetchy Valley, and they had been directed to open an office at San Francisco to receive the engineering reports of the city *as and when they were completed* (Trans. pp. 104 and 105). By reason of the various continuances granted, the hearing upon the show cause order was not had until November 25-30, 1912, when the then Secretary, Mr. Fisher, refused to take any action upon the report of the Army Board or upon the reports and data furnished by the city on the ground, among others, that Congress alone had the exclusive power and jurisdiction to grant the irrevocable rights of way and franchises such as were contemplated in the Garfield permit. The City of San Francisco then proceeded to Congress with its application and at the special session convened in the spring of 1913 exerted its full resources in securing the passage of what is now known as the

Raker Bill, being the House Bill, as amended, for an Act of Congress granting exclusive dam-site, reservoir and power privileges to the city at Lake Eleanor, Cherry Creek and in the Hetch Hetchy Valley.

The Raker Bill was before the House Committee on Public Lands for public hearing in June and July, 1913, and having passed the House that summer, came before the Senate for debate upon final passage in December, 1913. On December 2, 1913, as found by the verdict, the defendants caused to be printed, published and circulated in the City of Washington, D. C., a special Washington edition of the San Francisco Examiner for the purpose of influencing the action of Congress in favor of the passage of the Hetch Hetchy Bill. The paper contained no reading matter of any description whatsoever which did not have for its object and purpose to create a feeling in the minds of Senators favorable to the application of the City of San Francisco for the special franchise and privileges that it was seeking in the Hetch Hetchy. It was this issue which contained the matter found by the jury to be libellous, and which is as follows:

> INSPIRATION OF OPPOSITION.
>
> "During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the City of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

> "But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston" (Trans. p. 114).

In the same issue and in close proximity with the foregoing there appeared a most scandalous attack upon the Mr. Sullivan whose name appears in the libel (Trans. pp. 111-114).

The complaint pleaded the particular matter charged to be libellous in connection with the following innuendoes:

> "That by the use and publication of said words and language used and published by said defendants, and each of them as aforesaid, on the seventh page of said special Washington edition of said newspaper and opposite the publication of the words and language heretofore set out charging the said Eugene J. Sullivan to be 'a thief' and 'a man who ought to be in the penitentiary', they and each of them intended to charge and assert, and to be understood as charging and asserting, and were by the readers of said newspaper in fact understood as charging and asserting that this plaintiff was guilty of the fraudulent intent, purpose and design to combine and conspire with the said Eugene J. Sullivan to perpetrate a gross fraud upon the City of San Francisco by and through the sale to said city of a worthless opposition water supply and that said plaintiff did pretend to have such opposition water supply to sell to said city and that, because he pretended with said Sullivan to have such opposition water supply to sell to said city he was led to and did

make gross and careless aspersions on said city of San Francisco, the advisory board of army engineers and engineers generally (meaning thereby to refer to the statements that had been made before various congressional hearings, upon the authority of plaintiff concerning the suppression of said Bartell-Manson Report by said City of San Francisco).

"That this plaintiff had been proved at the hearing before the Committee on Public Lands of the House of Representatives to be guilty of combining and conspiring with said Eugene J. Sullivan to perpetrate and of perpetrating a gross fraud either upon said committee, or upon the House of Representatives, or upon Congress, or upon the City of San Francisco, or upon some other person or persons, corporation or corporations, public or private, heretofore unnamed.

"That this plaintiff was the tool, sycophant or hireling of said Eugene J. Sullivan, and, therefore, of 'a thief' and 'of a man who ought to be in the penitentiary' and that as such he would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to Truth and Right; and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of the said Sullivan" (Trans. pp. 56, 57).

All of the references to Mr. Sullivan and Mr. Aston in the special Washington edition of the San Francisco Examiner were veiled so far as any indication being given as to the nature of their alleged misconduct in general or to their connection

with any specific disclosures made by them to Congress concerning the suppression of any report or data that had been ordered submitted to the Army Board and to the Secretary of the Interior under the terms of the order of May 27, 1910.

This fact in connection with that already mentioned, viz., that the complaint alleged the libel to have been malicious, is most important as constituting the test by which the Court will determine the relevancy of proffered evidence, the admission of which the defendants now assign to have been error.

Bearing in mind then the scope of the action, a full comprehension of which can be best gathered from the inducement matter pleaded in the complaint, an examination of the record will show that full proof was made of the following salient facts:

In May, 1913, Eugene J. Sullivan and his wife, being the owners of all the issued capital stock of the Sierra Blue Lakes Water and Power Company except the shares necessary to qualify other directors, executed their power of attorney to Richard Keatinge and his son of San Francisco by which they were empowered to make a sale of said stock at their discretion; that thereupon these attorneys-in-fact gave a three months' option to Mr. W. J. Wilsey within which he might make a sale and delivery of the entire property and assets of the Sierra Blue Lakes Water and Power Company to some English and Continental clients (Trans.

pp. 167-172). Mr. Aston was employed as an engineer by Mr. Wilsey to make a report on the company's properties (Trans. pp. 174-181). Mr. Aston's report, which was completed in July, 1913, did not take into account any question of the value of the properties for resale to the City of San Francisco for a municipal water supply, but expressly excluded that notion (Trans. pp. 296-299), and the report was confined to the value thereof for development as a hydro-electric and irrigation project and for the sale of water for domestic supply to such interior towns as Sacramento, Stockton and others. Mr. Aston in his report in July was simply following out a policy which he had formed with respect to the development of these properties as early as the 8th of May, 1913, when he wrote Mr. Wilsey as follows:

> "It will be necessary to get San Francisco and Hetch Hetchy out of your associates' heads—the success of the project is not dependent on them" (Trans. p. 288).

Mr. Wilsey's option expired by limitation in August, 1913, and with its expiration Mr. Aston's direct interest in the property ceased. His indirect interest as an engineer on behalf of his employer, in purging the Mokelumne properties from the gross slanders that had been heaped upon them by engineers in the employ of the City of San Francisco is made to appear very clearly in the record. As an engineer he believed these properties were more valuable for the purpose of constructing

works than simply for buying them to sell to the city (Trans. pp. 240-244). In the latter part of May, Mr. Aston learned from Mr. Wilsey that a Parisian gentleman, Mr. Turck, who was contemplating presenting the Blue Lakes project to the consideration of Baron Reille, knew of the existence of the Freeman Report upon the San Francisco Water Supply and that the report included a report on the properties of Sierra Blue Lakes Water and Power Company (Trans. pp. 291, 292). On reference to the Freeman Report Mr. Aston learned what Mr. Freeman had said concerning the Mokelumne sources in part as follows:

> "The Mokelume River As An Alternative Source to the Tuolumne.
>
> "The Mokelumne is next in the order of proximity to the Tuolumne after the Stanislaus. The possibility of its use by San Francisco has several times been brought forward by promoters and has received some publicity thru the advertising of the claims by the Sierra and Blue Lakes Water Company, that it could provide the City of San Francisco with an adequate supply of water, coupled with an electric power project from which the income would pay a profit on the whole enterprise.
>
> "This Source Several Times Investigated for San Francisco and Rejected
>
> "The City Engineer, Mr. Manson, happened to have made brief studies and an adverse report on these Mokelumne sources six years previously, but conformably to the request of Secretary Ballinger began further investigations, comprising surveys of the principal reservoir sites named by the present promoters. Upon Mr. Manson's disability by illness, al-

ready referred to, the continuation of the Mokelumne investigation was turned over to Mr. C. E. Grunsky, who had himself studied this river as a possible source for San Francisco eleven years ago and also had been familiar with many of its features from boyhood, his early home having been in Stockton. Mr. Grunsky's full report, prepared in July, 1912, was filed with the Advisory Board of Army Engineers under date of August 1, 1912, in triplicate, comprising, with appendices, 174 typewritten pages and numerous tables and diagrams. The following is a very brief abstract of the report as filed. Copious extracts from it are presented in Appendix 18.

"In the report filed Mr. Grunsky notes that the possibility of supplying San Francisco from these sources was investigated by Col. G. H. Mendell (Municipal Reports 1876-77), and refers to his own investigation of 1901 and to that of these Mokelumne sources made for City Enginer Woodward in 1906.

"All of these previous investigations had so plainly brought out the disadvantages of the Mokelumne that Mr. Grunsky evidently was impressed with the unwisdom of spending any large sum of money at the present time for further field work in detail, and so bases his statement upon the facts already on record. Moreover, there was not time for any extensive new field work after Mr. Grunsky was called in to take up the work which Mr. Manson had not completed at the time of his illness. I have not visited this region myself, but have carefully reviewed the data presented by Mr. Manson and Mr. Grunsky. * * *

"To these I need only add that an inspection of the large scale map makes plain the fact that all of the advantages of dam-site, length of aqueduct, quality of storage reservoirs, future water power possibilities, and the great

> advantage of not having to seek some additional source, at a time when sources equal to those now available are impossible to obtain, are all so plainly and strongly on the side of the Hetch Hetchy and Upper Tuolume that I do not believe it advisable to expend the $15,000 to $30,000, more or less, which exploration and complete surveys for thoroughly working out the best possible project for a municipal water supply from the Mokelumne would cost'' (Trans. pp. 226-228).

After having made a personal survey on the ground of the Mokelumne sources, Mr. Aston knew that Mr. Freeman was either deliberately misrepresenting the facts or that he had been grossly misled by the officials of the engineering department of San Francisco. We come, therefore, directly to the significance of the discovery in June, 1913, of the suppressed Bartel-Manson report *which was completed in April, 1912,* and which should have been furnished as the report of City Engineer Manson made for that purpose to the Advisory Board of Army Engineers and by them to Secretary Fisher for use at the hearing of the show cause order in November, 1912. The facts surrounding the discovery of this suppressed report and the motives of Mr. Aston impelling him to disclose his discovery to the House Committee on Public Lands fully appears in Mr. Aston's letter to Senator Chamberlain of July 16, 1913 (Trans. pp. 245-252; see also Trans. pp. 229-232).

Without attempting to detail what the record shows in this behalf it will be sufficient to say that

when Mr. Aston became possessed of the Bartel-Manson Report in June, 1913, the House Public Lands Committee being at the time in public session and holding hearings upon the Raker Bill, he immediately communicated to the committee disclosing the existence of this report and he represented that it conclusively showed the availability of the Mokelumne River in the High Sierras as an adequate source of domestic water supply for the City of San Francisco when used in connection with Lake Eleanor and Cherry Creek under the Garfield Permit (Trans. 122-136).

Mr. Aston further represented to the Committee that this report had been made by and under the direction of the then City Engineer of San Francisco in April, 1912, in conformity with the order of the Secretary of the Interior to which reference has already been made; that, as emendated by the City Engineer in his own handwriting, the report on the Mokelumne River source carried the following significant statement almost exactly in the words used by the Secretary of the Interior in granting the continuance of the rule to show cause (Trans. pp. 122-136).

Following these words and figures, "the critical period August, 1907, to December, 1909, inclusive, equals 518 days, 224,408 divided by 518 equals *432 million gallons daily draft available to San Francisco,*" there was appended a notation in the handwriting of Mr. Manson in the words "*provided all rights and all reservoirs are secured and utilized,*

this source under this assumption is sufficient to meet the demands of the region about the Bay of San Francisco when re-enforced from a full development of Lake Eleanor, but the cost is manifestly prohibitive." Also, that at the same place in said report there was a further notation in the handwriting of Mr. Manson in the following words; "put in the capitalized value of the Sierra & San Francisco Power Company plus $6,000,000.00 Blue Lakes plus cost of developing 60 M. G. D. later given" (Trans. pp. 189, 190).

Mr. Aston then charged that this report was suppressed from the Army Board and the Secretary of the Interior, and that another and unfavorable report as to the availability of the Mokelumne source was afterwards prepared and submitted to the Army Board, showing only 60 million gallons per day available to San Francisco from this source.

We will not attempt to enlarge upon the significance of the fact that this suppressed Bartel-Manson Report was in existence at the time Mr. Freeman was led to make the representations in his report that the only data on the availability of Mokelumne sources was that of the obsolete character which he described, and that lack of time prevented the completion (?) of studies in the field which had been begun by Mr. Manson, but which had been interrupted by the latter's illness. The maps accompanying the photographic copy of the Bartel-Manson Report show they were all made between the years 1910 and 1912.

An attempt was made by the defense to show that the result of Mr. Bartel's studies were furnished the Army Board through the report of another engineer, C. E. Grunsky, employed by the city to take up the work after Mr. Manson's illness. The cross-examination of this gentleman at pages 351-363 will show the extent of their success in this regard. The diagram referred to as the Mokelumne River Drainage Area, period 1896-1900, and which was not given to the Army Board (Trans. p. 355) was the result of original work in the field by Mr. Bartel, and the significance of its being withheld lay in the fact that from it the Army Board would have been able to determine that there was available from 430 sq. miles in the upper Mokelumne river catchment, 366 million gallons of water per day to San Francisco (Trans. p. 395).

Mr. Grunsky, for the defense, having stated that all reports that he had made while in the employ of the city had reached the Army Board (pp. 334, 335) pursuant to the order of the Secretary of the Interior, it was shown on rebuttal by William Bade, Professor of Semetic Literature and Archeology in the Pacific Theological Seminary, that the Grunsky-Hyde-Marks report on the Alameda Creek run-off, a property of the Spring Valley Water Company, was withheld from the Army Board and from the Secretary until it was drawn out by Mr. Fisher at the hearing in November, 1912. This report was favorable to the

contentions of the Water Company as to the amount of water available from that catchment (Trans. pp. 380-386; see also pp. 372 and 373).

It is necessary to state that the so-called Bartel-Manson report on the Mokelumne River sources of water supply was never laid before Congress or any of its committees during the hearing upon the Raker Bill. Mr. Aston, not being in the employ of Mr. Sullivan in June and July, 1913—nor at any time—and Mr. Sullivan insisting on going to Washington in his own behalf, refused him the possession of the photographic copy of the report, trusting that an opportunity might be afforded him later to make full and complete scientific use of it in vindicating the properties and not Mr. Sullivan, for whom, however, he had a real sympathy as for a man with a just grievance. Mr. Sullivan's appearance before the House Committee on Public Lands was unfortunate, but it in no way justified the attack made upon him as having been shown to be a "thief and a man who ought to be in the penitentiary". One of the gratifying features in connection with the trial of this case is that we used Mr. Sullivan as a witness in behalf of the plaintiff; and we did this because, to say the least, it would have been unkind to have used the wholly unwarranted statements made against him for the purpose of giving the point to the libellous matter so plainly intended by its publication, and leave the inference that those statements were true. We not only offered Mr. Sullivan to the cross-examination of the de-

fendants, but we introduced *in toto* the record of the whole proceedings had before the House Public Lands Committee, when he was before it as a witness, and read such parts of it to the jury as in our opinion supported our case. The Court will recall the rule of evidence that makes the whole of such a record, when offered generally, equally available for use by both parties. We are glad to say that the defendants could not put a finger on a single word or sentence in the whole proceedings which would in any way justify the statements made against Mr. Sullivan in the issue of the paper in question. At the time of the trial Mr. Sullivan had allowed the statute of limitations to run against his right of action for libel, and this Court may be assured that counsel for the defendants exercised the greatest caution to avoid any reference to the article in question by way of derogation of Mr. Sullivan which in any way could be interpreted as a re-publication of their former charges against him.

Argument.

A. THE COURT DID NOT ERR IN ADMITTING PROOF OF THE STANDING OF THE PLAINTIFF AS AN ENGINEER IN THIS COUNTRY AND IN EUROPE.

The defendants depend upon the rule laid down in Davis v. Hearst, 160 Cal. 143, 185, to sustain their assignment of error in this connection, and in three separate places in their opening brief state with the

most solemn deliberation that the Supreme Court of California in the case mentioned passed upon and construed section 2053 of the Code of Civil Procedure of California. (Defendant's brief pp. 42, 43, 47.) At page 43 they say:

> "This Court is bound to assume that the Supreme Court of California in deciding Davis v. Hearst did so with reference to the provisions of section 2053 of the Code of Civil Procedure."

The vigor with which this is enforced upon the attention of the Court renders it imperative, in the interest of the plaintiff, to directly charge here, as we did below upon the argument of defendant's motion for a new trial, that such a representation is not borne out by the facts. The attention of the Court is called to the fact that the attorney of record for the plaintiffs in error here (the defendants below) has been engaged in the defense of Mr. Hearst's libel actions since at least as far back as December, 1896, the date of the reported decision in Taylor v. Hearst, 115 Cal. 394. The attorney of record here and one of the counsel whose names appear on the brief on file in this Court, were, respectively, attorney and counsel for Mr. Hearst in Davis v. Hearst. Both gentlemen *know* the fact to be that neither the record nor the briefs of counsel raise the question of the construction of section 2053 in the latter case. The oral argument of the attorney of record here, made in the Supreme Court of California, is extended in the printed public record together with the briefs. We must therefore

ask him to categorically deny, either orally at the argument or in writing, the statements both directly and inferentially made here that this section of the Code of Civil Procedure received the construction he contends for, or any construction, in Davis v. Hearst.

Except for the insistence with which counsel urge this assignment, we might well be content to rest upon the ruling of the trial Court denying the motion for a new trial upon the ground that the general objection to the admissibility of the testimony complained of was not sufficient to entitle them to an exception. This ruling followed the same representation made by us here concerning the unfairness of counsel in not advising the Court below of its familiarity with the ruling in Davis v. Hearst, and in failing to argue the point they now make, at the trial. The strength of the position taken by the learned trial judge is increased by the evidence of the industry and learning which counsel here display in attempting to support the assignment by reference to what they conceive to be a proper construction of section 2053. If they intended to rely here upon such a construction of the statute, obviously their objection below should have been put upon the ground that the evidence in question was inadmissible by reason of the statute.

In the trial of this case below the plaintiff by the allegations of his complaint, and the defendants *by their general denials,* put in issue the fact that the plaintiff was by profession a civil engineer who for

the past fifteen years had been continuously and actively engaged in the practice of his profession in different parts of the English speaking world, and was at all the times mentioned in the complaint thus engaged in the United States of America; that by the use and publication of the alleged libellous words, the defendants meant to charge, and to be understood as charging, that in the practice of his profession the plaintiff was the tool, sycophant, or hireling of one Eugene J. Sullivan, whom the defendants by the same publication had charged to be "a thief" and "a man who ought to be in the penitentiary", and that as such he, the plaintiff, would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to Truth and Right;

> "and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting facts in connection with the Hetch Hetchy project at the bidding and behest of said Sullivan."

The questions propounded to the witness Wilsey, the admission of the answers to which is assigned as error under the rule in Davis v. Hearst, 160 Cal. at pages 185 and 186, are as follows:

> "Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world, meaning thereby *among consulting engineers and among construction engineers and those* engaged in promoting and constructing *engineering* projects in this coun-

> try *and in Europe,* or in either of said countries, for the truth and veracity *of his engineering reports as a consulting engineer?"*

Having answered that he did, the witness was asked:

> Q. 20. "State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid."

The answer was that it was good both in this country and in Europe.

We submit that this statement of the issues of fact made by the pleadings, and of the issue of law raised by the defendants' assignment of error, are wholly different from that set forth in the statement and argument of counsel to which this is a reply. The testimony sought to be illicited from the witness is not in any sense character testimony, that is to say testimony of general good character of that nature which the court is asked to rule is inadmissible on the plaintiff's case in chief and in advance of an attack upon it by the defendants under the authority of Davis v. Hearst.

The testimony given by the witness Wilsey was in support of particular allegations of the complaint put in issue by a general denial, and went to prove the extent and the peculiar nature of the injury to the plaintiff's professional reputation by reason of the alleged libellous publication. This testimony was relevant unless there is a rule of exclusion, of which we confess ourselves to be ignorant, which

prevents a plaintiff from proving the territorial limits to which his reputation runs and the nature of the injury to it, from a standpoint of professional considerations.

But if reputation for good character may not be considered to be put in issue in all actions for defamation under the provisions of section 2053, C. C. P., although by the express terms of the statute, "Evidence of good character" of a party is admissible when "the issue involves his character", until it is attacked, still there is no restriction, and in reason there can be none, against the parties putting in issue the plaintiff's good character; and that is exactly what the plaintiff and the defendants have done by the issues joined in this case.

We have little disposition to follow the learned counsel for the defendants through their attempt at a closely reasoned argument in support of the proposition that the rule laid down in Davis v. Hearst is the common law rule, and that section 2053, C. C. P., is to be construed as declaratory of the common law upon the subject, even though such a construction results in obliterating the second and disjunctive clause entirely from the statute. The argument not only involves several *non sequiturs,* but is also in the teeth of section 4, C. C. P., which declares that all of the provisions of the code are to be construed liberally, with a view to effect their objects and to promote justice; and therefore, without desiring to reflect upon the great legal acumen of our opponents we will dismiss all further con-

sideration of their able brief and proceed directly to a consideration of this very interesting question as it presents itself to our view.

In the first place it would seem that in matters of evidence as well as in matters of substantive law, the Federal Courts are bound "to give effect to the laws of the several states" whether dealing with questions of the competency of witnesses, or other rules relating to the nature and principles of evidence; also that "the laws of the several states" include the decisions of their highest Courts, in the matter of establishing rules with respect to evidence.

Nassau Savings Bank v. American L. M. & A. Co., 189 U. S. 221; 47 Law. ed. at 785.

But it is also well settled that, when the decisions of the highest Courts of the state are to be looked to for "the law of the several states", it is *"the settled law"* which must govern the Federal Courts, and in the absence of a settled rule of decision of the State Court construing a statute or the organic law of the state, the Federal Courts not only may, but it is their duty, to exercise an independent judgment touching the validity, interpretation, or scope of the state statute in question.

Gelpcke v. Dubuque, 1 Wall. 175; 17 Law. ed. 520;

Rowan v. Runnels, 5 How. 134; 12 Law. ed. 85;

Ohio Life Ins. Co. v. Debolt, 16 How. 416; 14 Law. ed. 997;

Havemyer v. Iowa Co., 3 Wall. 303; 18 Law. ed. 42;

Douglas v. Pike Co., 101 U. S. 667; 25 Law ed. 971;

Burgess v. Seligman, 107 U. S. 20; 27 Law. ed. 365;

Kuhn v. Fairmount Coal Company, 215 U. S. 349; 54 Law. ed. 233;

So. Pac. R. R. Co. v. Orton, 6 Sawy. 195; 32 Fed. 477-478.

In the case of Kuhn v. Fairmount Coal Co., the Court says:

> "We take it, then, that it is no longer to be questioned that the Federal Courts, in determining cases before them, are to be guided by the following rules: * * * 3. But where the law of the state is not thus settled, it is not only the right but the duty of the Federal Court to exercise its own judgment, as it always does when the case before it depends upon the doctrines of commercial law and general jurisprudence."

And again in the same case:

> "The Court took care in Burgess v. Seligman, to say that the Federal Court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different states, if, while leaning to an agreement with the State Court, it did not exercise an independent judgment in cases involving principles *not settled* by previous adjudications." (The italics are ours.)

The jurisdiction of the Court in the action at bar rests upon the same constitutional provision as was

there under discussion, the plaintiff being an alien resident of the State of California.

At the oral argument we called the Court's attention to the fact that the question as to the right to prove general good character in the examination of the plaintiff's witnesses in chief in this class of actions, had arisen in but two cases in the Supreme Court of California; that the Court had ruled both ways upon the question, and in neither case was reference made to the rule established by the second and disjunctive clause in section 2053, C. C. P. The cases are Turner v. Hearst, 115 Cal. 394, at page 399, and Davis v. Hearst, *supra.*

In the former the Court held that

> "It was not error for the Court to allow proof of the extent of the plaintiff's practice",

where the plaintiff was a lawyer engaged in the practice of his profession, and where the words of the publication, admittedly libellous *per se,* affected the plaintiff's standing in his profession.

If, as would seem to be the case, it was not the intention of the Court in Davis v. Hearst to overrule Turner v. Hearst upon this point, the latter is the law of California where the question arises as it does in the case at bar.

In Davis v. Hearst, as we pointed out on the argument of the motion for a new trial, Mr. Justice Henshaw clearly purposes to recognize a distinction in the law between the case where general good character of the plaintiff may not be proved in his case in chief, and where good character or repu-

tation may be so proved when specially put in issue as in the case at bar; for he quotes as follows from Odgers on Libel and Slander, p. 366:

> "The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleading, or has been attacked by the cross-examination of the plaintiff's witnesses; for until then the plaintiff's character is presumed to be good."

A rule, we may say in passing, neither so sweeping nor so unreasonable as the one which counsel for the defendants seek to establish as that laid down in Davis v. Hearst. When Mr. Justice Henshaw's decision is read in the light of the publication charging the plaintiff Davis with "School Graft" that "Would Make a Ruef Blush" and of the fact as shown by the record that the answer raised the general issue, it will be readily seen that the learned justice overlooked the fact that the offer of the plaintiff to prove general good character for honesty and integrity was not broader than the particular issues raised by the pleadings, and that the case in that respect was not distinguishable from Turner v. Hearst. A careful examination of the whole record in Davis v. Hearst, and of the briefs of counsel, shows that this aspect of the question was never called to the attention of the Court, nor was section 2053, C. C. P., relied upon by the plaintiff to justify his offer to prove general good character in his main case. We say, therefore, that Davis v. Hearst, was not a case for the application

of the doctrine that general good character may not be proved until either it is impeached, or unless character is involved under the narrower construction which is claimed for section 2053; i. e. unless *good character* is specifically in issue on the pleadings.

The narrower construction is not the one, however, that the statute in question should bear. It will not be further contended by counsel for the defendants, in the light of what we have already said concerning their duty to this Court, that it has ever received such a construction by the California Courts, or that the second clause thereof has ever received any construction in an action in which the issue involved character. It is true that the counsel urges this Court is bound by the dictum expressed in Vance v. Richardson, 110 Cal. 414, to the effect that

> "Section 2053 of the Code of Civil Procedure is merely a concise statement of the rule that is to be found in the text books and judicial decisions;"

but that was a case of assault and battery where the Court correctly held that character evidence was as inadmissible under the statute as it was at common law.

The statute has received the notice of the State Court in People v. Vissellus Amanacus, 50 Cal. 233 and People v. Bush, 65 Cal. 129, both of which involved the impeachment of a witness; in Title Ins. Co. v. Ingersoll, 153 Cal. at p. 7, which was an action to enforce an alleged trust in the defendant,

who offered evidence in support of this character for truth, honesty, and integrity, and the Court held that

> "The issue in the case did not involve the character of the defendant as a party, * * * and no attempt had been made to impeach his character."

In Van Horn v. Van Horn, 5 Cal. App. at p. 721, the Court sustained the refusal to admit proof of good character of a defendant in a divorce case charged with adultery, in advance of its impeachment, on the ground that her character was not in issue. These are all the California cases on the subject.

We are, however, willing to be bound by the dictum of the Court in Vance v. Richardson, not only because, in our opinion, it declares correctly that section 2053 states the prevailing rule at common law upon the subject, but also because such prevailing rule at common law let in the proof of general good character in all cases where character is involved in the issues; e. g. in slander, libel, breach of promise, and seduction.

In Burnett v. Simpkins, 24 Ill. at p. 266, the Court says:

> "In actions for libel, slander, and the breach of marriage contract, the jury may, in assessing the damages, take into consideration the injury sustained by the plaintiff as well to the reputation and standing in society, as the situation of the parties. And no rule appeals more strongly to our sense of justice, or is more consonant with the principles of right, than that an

injury to the reputation of the good and virtuous, should be compensated in damages. And the proposition is too plain to be denied by any, that an injury to the character of a virtuous and good woman, is greater than that of one who is depraved and abandoned. To place the character of the two upon the same level, and to hold that an injury to the one is no greater wrong than to the other, is to confound all distinction between virtue and vice, the good and the depraved. That there ever has been and will continue to be a difference, is as obvious as that virtue is preferable to vice.

"No court has ever announced as a rule, in the assessment of damages, that a slander to the character of the low and depraved, is to be compensated by the same measure as if it had been inflicted upon the character of the good and upright. Such a rule can never prevail while any distinction is made in character. When all distinction is lost, then, and not till then, will the same rule, in measuring damages, be applied. In assessing damages for the breach of a marriage contract, the doctrine is well settled, that the jury may take into consideration all the injury sustained, whether it be from anguish of mind, from blighted affections, or disappointed hopes, as well as injury to character, immediately resulting from the breach of the promise. And this court has repeatedly held, that evidence of a seduction, the consequence of the marriage contract, may be given in aggravation of the damages. It will not be insisted that the breach of promise will occasion the same anguish of mind, or produce the same injury to the reputation of a prostitute, as to a pure and virtuous woman. Nor can a seduction result in the same injury to her character, as to that of a virtuous female. And these are proper considerations for the jury in estimating damages. If injury to the

> feelings and character of the party injured, could not be considered by the jury, there would be more plausibility in the position that evidence of bad character of the plaintiff could not be received in mitigation. But if the plaintiff may go outside of a mere pecuniary loss, and enhance the damages by showing mental suffering, loss of position and character, it would seem to follow that the defendant may show in mitigation the want of character, or one that is not above suspicion."

Another case, sustaining as a rule of common law, the right of the defendant to prove the bad character of the plaintiff in mitigation of damages under the general issue in an action of defamation, is Stowe v. Converse, 4 Conn. at pp. 41 and 42. The Court says:

> "It has been correctly said (Phill. Ev. 139) 'as evidence is confined to the points in issue, the character of either party cannot be inquired into, in a civil suit, unless put in issue by the nature of the proceeding itself.' Although it has been questioned, whether in an action for libel, the defendant may give in evidence, under the general issue, the plaintiff's character in mitigation of damages: (Foot v. Tracy, 1 Johns. Rep. 46) I entertain no doubt as to the admissibility of such testimony. 'The character of the plaintiff' said Ch. J. Kent, 1 Johns. Rep. 52-3 'must be considered as coming in, at least, collaterally, upon the trial,' 'and the injury to it is the gravamen complained of'. The plaintiff's character is the principal object attacked; and for the vindication of this specific injury, his suit is instituted; and in proportion to the fairness of his reputation, are damages sustained. Hence he comes prepared to support his character in order to deepen the proof of injury; and the defendant

> likewise, to protect himself from damages, makes his preparation to reduce to its proper standard that reputation which the parties, by their pleadings, have made an interesting question between them."

The same Court in the later case of Bennett v. Hyde, 6 Conn. at pages 26 and 27 after referring to the rule as laid down in Stowe v. Converse, says, in answer to the assignment of error that evidence of the good character of the plaintiff had been improperly received:

> "The plaintiff's character is not made the subject of inquiry, at the defendant's option, and shut out of view, or the subject of investigation, as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts of this state have never acceded; but they have recognized and acted on the principle, that the final object of the plaintiff's suit, is the vindication of his character; and that his reputation of consequence, is put in issue by the nature of the proceeding itself."

The Court below in its decision denying defendant's motion for a new trial expressly held that the admission of the testimony, here assigned as error, was proper under the rule laid down in Taylor v. Hearst, *supra,* as touching the plaintiff's standing as an engineer; in other words, that it was not to be considered "character testimony" in the common legal acceptation of the term (Aston v. Examiner Printing Co. et al., 226 Fed. 496). Besides holding the rule concerning the admission of "character testimony" in actions of slander and

libel, as we contend it should be, the Courts of Virginia, West Virginia, Kentucky, North Carolina, South Carolina, Tennessee, Illinois, Connecticut and Massachusetts uphold the doctrine laid down in Taylor v. Hearst, and in Pennsylvania, the Court in Klumph v. Dunn, 66 Pa. St. 147, draws a distinction between the application of the rule denying the admission of testimony of general good character in advance of an attack as laid down in Chubb v. Gsell, 34 Pa. St. 114, and allows testimony of the plaintiff's standing in the community in which he lives; a distinction which we are free to confess that we can hardly follow.

The cases in the Federal Courts uniformly follow the rule laid down in Taylor v. Hearst, the best considered of which are

Press Pub. Co. v. McDonald, 63 Fed. 238;
Duke v. Morning Journal Assn., 128 Fed. 657.

The first case above mentioned contains a full discussion of the New York authorities and Judge Lacombe finds none of controlling weight that would prevent a Federal Court from receiving testimony of the plaintiff's "social standing" in an action for libel, and of his "social and business standing" in the other case cited. The rule in these cases, so much broader than is necessary to sustain the position of the plaintiff in the case at bar, has the implied sanction of the Supreme Court of the United States by reason of the fact that a writ of certiorari was denied by it in the last case (194 U. S. 632).

We respectfully represent that these cases are of prime authority, and we will not attempt to abstract their contents, assuming that the Court will desire to examine them for itself.

It seems to us that in view of the foregoing, there can be no doubt of the meaning that Mr. Field, or whoever it may have been that wrote the original section 1849 of the proposed Code of Civil Procedure for New York, from which section 2053 C. C. P., of California, is taken *verbatim,* had in mind, and that it was the intent of its author to establish the rule so clearly and decisively set forth in the cases to which we have referred. Defendant's contention would make the statute read that "evidence of good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, and unless the issue involves his (good) character". We respectfully submit that there is not an iota of authority to support such a contention; and, if there was, it would not shut out the proof offered by plaintiff here because the plaintiff's good professional character for the honesty and integrity of his engineering reports was put directly in issue by the pleadings.

Again we submit that this question is to be more properly tested by an application of the general principles of the law of damages than by a reference to principles governing the law of libel; and this is what Mr. Sutherland has to say upon the subject:

"The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins, and until the presumption is overturned by proof. It is trite to say that what the law presumes, and so long as the presumption continues need not be proved; but where proof may add to what the law presumes or make specific what the law presumes only in a general way, and such addition and particularity may legitimately increase damages, it is admissible in the first instance to increase damages; *as in the case of the element of malice.* As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is presented to them upon the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be received." (The italics are ours.)

4 Sutherland on Damages (3rd ed.), pp. 3501-3502.

Other cases in support of the rule are:

Williams v. Haig, 3 Rich. Law (S. C.) 362; 45 Am. Dec. 774;

Adams v. Lawson, 17 Grat. 258;

Shayer v. Miller, 3 W. Va. 158;

Sample v. Wynn, Busb. (N. C.) 319;

Burton v. March, 6 Jones (N. C.) 409;

Romayne v. Duane, 3 Wash. C. C. 246;

Nellis v. Cramer, 86 Wis. 339;

Williams v. Greenwade, 3 Dana 432;
Larned v. Buffington, 3 Mass. 546;
Fountain v. Boodle, 3 Q. B. 5.

Upon the point that in any event the admission in evidence of the testimony of the witness Wilsey was not prejudicial we ask the Court to refer to the particularly well considered case of Adams v. Lawson, *supra.* In the case of Bailey v. Hyde, 3 Conn. at p. 467, which was an action for slander, the concluding paragraph of the opinion is as follows:

> "The defendant must render it reasonably apparent that justice has not been done him, and to such extent, that in the sound exercise of discretion, it is fit there should be a new trial. This in my judgment he has not done; and, therefore, his motion must be denied."

B. THERE WAS NO ERROR IN ADMITTING IN EVIDENCE ARTICLES APPEARING IN VARIOUS NEWSPAPERS THROUGHOUT THE UNITED STATES ON JULY 7 AND JULY 8, 1913, AND WHICH CONTAINED NOTICE OF MR. SULLIVAN'S CHARGES AGAINST THE CITY'S ENGINEERS RELATING TO THE SUPPRESSION OF DATA.

One of the features of the libellous publication, which counsel for defendants fail to take into consideration, is that of its utter blindness in the face of the wide publicity which had been given to activities of Sullivan and Aston characterized by the defendants as consisting in "gross and careless aspersions made upon the City of San Francisco, the army engineers and generally". The complaint alleges by way of inducement that

"at and prior to the time said bill came up for debate in the Senate of the United States, as aforesaid, considerable public attention and interest throughout the different parts of the United States had become centered upon the obviously great efforts that were being made by the agents and lobbyists maintained at Washington as aforesaid by said City of San Francisco in behalf of the passage of said bill and much public criticism had been and was indulged in between the months of June and December, 1913, by the press of the United States over and concerning the suppression from the Advisory Board of Army Engineers of the favorable report of the city engineer of said San Francisco, prepared in April, 1912, as aforesaid, showing the availability and adequacy of the Mokelumne source of water supply for said City of San Francisco; that said suppressed report was known to the press and the public of the United States as the 'Bartell Report' and the 'Bartell-Manson Report'; that the fact of the suppression of said report was first made public by and through the statements and communications made by the plaintiff as aforesaid and was first publicly testified to before the Committee on Public Lands of the House of Representatives by the said Eugene Sullivan on the 7th day of July, 1913, that no reference was made in said special Washington edition of said San Francisco Examiner by said defendants, Hearst and Examiner Printing Company, to said Bartell-Manson Report or to the fact of its suppression and the concealment thereof from the Advisory Board of Army Engineers by said City of San Francisco" (Trans. pp. 17, 18).

Defendants moved to strike this portion of the complaint under specifications Nos. 32 to 36 inclu-

sive (Trans. pp. 36, 37), which motion was denied upon proper authority.

The rule regarding the pleading of inducement has been stated in various ways:

> "Inducement should consist of such facts as authorize an inference against the right asserted by the other party."
>
> Egberts v. Dibble, Fed. Cas. No. 4307.

> "A plaintiff whose attacks are not wrongful per se, but which may be perfectly consistent with good faith and fair dealing, must aver and specify the facts giving to it a different character."
>
> Hughes v. Murdock, 45 La. Ann. 935; 13 So. 182.

See also

31 Cyc., 102.

We submit that the authorities urged by the defendant in support of this assignment are not in point. All the latter publications in other papers mentioned in the cases they cite have reference to a repetition of the alleged libellous matter. Here the matters contained in the newspapers in question go to explain the hidden meaning of the libel, and in no way do they bear prejudicially upon the defendants in reference to the truth or falsity of the libel charged or to the fact of publication or non-publication.

C. THERE WAS NO ERROR IN ADMITTING THE TESTIMONY OF THE WITNESS GRUNSKY THAT THE HYDE-MARKS-GRUNSKY REPORT ON THE ALAMEDA CREEK RUN-OFF WAS TURNED IN LATE.

Mr. Grunsky testified *on behalf of the defendants* on *direct examination* as follows:

> That during the years 1912 and 1913 he was asked by the Board of Supervisors to take charge of work that had been in progress in the city engineer's office by Mr. Manson, who was then city engineer, and who by reason of illness was for a time incapacitated; that in connection with this work he was asked by Mr. Freeman, who had been called in to take charge of the Water Supply Investigation of San Francisco to make a number of studies relating to quite a number of sources of supply, Eel River, Feather River, Yuba River, Stanislaus River, Mokelumne *and others,* as various possible sources of water, indicated by the Board of Army Engineers to the City as desirable of investigation; that he made use of the information that was in the city engineer's office, put a number of assistants at work and gathered the information together, formulated reports upon these various sources of supply *and finally submitted them to the Army Engineers;* that his investigation included what is known as the Mokelumne River and the properties of the Sierra Power & Water Company (Trans. pp. 334-335).

It was on cross-examination that the witness stated that this particular report was turned in late. *As a matter of fact it was not turned in to the Board of Army Engineers at all by him,* and upon rebuttal it was proved by Dr. Bade that it did not

reach Secretary Fisher until the hearing upon the show cause order, November 25-30, 1912; *and then only* upon the complaint of the representation of the Spring Valley Water Company that there was such a report in existence. The Court will bear in mind that the witness was an *engineering* expert called by defendants to justify their statements that plaintiff had cast "gross and careless aspersions, etc., etc.," upon the City of San Francisco, the Army Board of Engineers, and engineers generally. Whatever effect this fact may have had upon the jury, it was a proper effect because it was of the essence of the issue whether or not the city had been guilty of the suppression of engineering data as charged by Mr. Sullivan and Mr. Aston. It was proper on cross-examination after the testimony of Mr. Grunsky as stated above; and Dr. Bade's testimony in rebuttal, it seems to us, is conclusive of its admissibility (Trans. pp. 380-387).

D. THE COURT DID NOT ERR IN ADMITTING EITHER THE STATEMENTS OF WITNESSES PRESENT AT THE MEETING OF THE CIVIC CENTER LEAGUE ON NOVEMBER 5, 1913, WHERE THE PLAINTIFF MADE A PUBLIC STATEMENT OF HIS ESSENTIAL CHARGES AGAINST SAN FRANCISCO OF SUPPRESSION OF REPORTS, ETC., ETC.; NOR IN ADMITTING THE REPORT OF THE MEETING IN THE SAN FRANCISCO EXAMINER OF NOVEMBER 6, 1913.

The admission of the paper was clearly proper in support of the charge of malice, after laying the foundation of notice by the testimony of witnesses

as to the fact of Mr. Aston having made the charges. Again we are confronted with the question raised by the hidden significance of the libel. The defendants in this case cannot hide behind the vagueness of their charges of unprofessional conduct on the part of Mr. Aston, and state in general terms that he was guilty of fraud, and was engaged in lying and deceiving Congress and the general public, when they themselves were engaged in a self-centered and self-interested publication, as well as suppression, of facts, concerning the same subject matter, without having their purposes and intents called into question. At page 80, counsel for the defendants with considerable *naivete* suggest that

> "The very publication complained of (meaning the libel) arraigns and takes the plaintiff to task for making the kind of charges that he made at the Civic Center meeting. The defendants in the publication of December 2, 1913, charged the defendant with making gross and careless aspersions upon the City Engineer and other engineers representing San Francisco. The plaintiff, having brought suit against the defendants for publishing such an article, now claims the article was actuated by malice because the defendants throughout months preceding the publication of the article complained of had failed to permit the use of columns of their newspaper to give currency to the very charges for the making of which they arraigned him in the publication complained of."

We cannot find much to complain of in the foregoing when it is remembered that the article in the newspaper of November 6, 1913, shows the failure of the defendant, Printing Company, to perform its

duty to the public to furnish "a fair report" of the meeting in question, and where the publication of the libel in the partisan brief or "broad sheet", (for the special Washington edition of the San Francisco Examiner was not a newspaper in any sense of the term), shows a conscientious purpose on the part of its publishers to be faithful to the special objects and interests it sought to serve. The characterization given to the publication issued at Washington, D. C., in the complaint upon which issue was joined by general denials (Trans. pp. 49, 52), and the newspaper itself, which is in evidence as Plaintiff's Exhibit 10, show conclusively, it seems to us, that this assignment of want of relevancy must fall of its own weight.

But if the testimony was irrelevant for the purpose of showing malice, the error in admitting it was not prejudicial for the reason that the jury found in favor of the defendants on the issue of *exemplary* damages.

E. AND F. THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE WITNESS WILSEY AS TO THE OBJECTS FOR WHICH HE EMPLOYED MR. ASTON TO MAKE A REPORT ON THE MOKELUMNE RIVER PROPERTIES OF THE SIERRA BLUE LAKES WATER & POWER COMPANY. NOR DID IT ERR IN RECEIVING TESTIMONY THAT THE PROPERTIES OF THAT COMPANY WERE OF SUBSTANTIAL VALUE.

The libel directly charged that Sullivan and Aston were inspired to make their charges directly

because of their desire to unload "an opposition water supply" and that such a scheme was "a gross fraud"; and the latter imputation could only arise by reason of the worthlessness of the property. The sting of this libel so far as Mr. Aston is concerned lies in the charge that, as "Sullivan's man Aston" he would and did resort to lying and misrepresentation of engineering facts with this particular object in view.

Not only were Mr. Aston's motives worthy in every respect but he took infinite pains to see that his clients, Mr. Wilsey and his London and Paris associates, should not labor under any misapprehension concerning the value of these properties quite apart from any value they might have as a water supply for San Francisco. The evidence shows that he had two motives for his activities in this matter i. e.; *a public* one and a *private* one. The *public* one was dictated by a sense of duty *as an engineer* in possession of knowledge concerning a matter then of great public interest to the members of the most important public body in this country, i. e. Congress, and which involved the necessity to disclose trickery and chicanery. The *private* one arose out of consideration for the welfare not alone of his clients but of persons then interested, or who at any time in the future might desire to become interested, in a great hydro-electric, and water supply property in California: He knew not only of the suppression of a valuable engineering report on the Mokelumne River sources and of the fact that the

political agents and lobbyists of San Francisco had for years been slandering the Mokelumne River properties in the interest of obtaining the grant of the Hetch Hetchy Valley from the United States Government as the only adequate supply for the city, but he had definite knowledge of the fact that these properties had received a "black eye", by reason of the evil practices related, in the Investment World so far distant from San Francisco as London and Paris. Every instinct of loyalty to his profession prompted him, in so far as he was able, to act as he did in the premises. He was charged with self-interestedness from the start. He was said to be Sullivan's man who wanted to help Sullivan sell worthless water supply property to the city. The proof shows that *on the contrary,* he was employed by Wilsey to make a report for European clients, and that both Wilsey and Aston reported to the latter that they must get the idea of San Francisco wanting the Mokelumne sources out of their heads (Trans. pp. 289, 290). Aston's report was completed in July, 1913 (Wilsey's option expired in August). In this report, speaking of the suppression of the Bartel-Manson Report, Mr. Aston says:

> "However, even under the most favorable conditions it is extremely unlikely that the San Francisco authorities would purchase the Mokelumne properties for some time. *And the objections made against (the) city's actions have been those which one would naturally put forward in order to rehabilitate the value of their properties and overcome the effects of misrepresentations made regarding them"* (Trans. p. 298).

In a letter written to Mr. Scott Ferris, Chairman of the Public Lands Committee on July 8, 1913 (Mr. Sullivan had appeared before the House Committee on Public Lands on July 7, 1913, and Mr. Aston had read the account of his testimony as given by the local papers of that date), Mr. Aston says:

> "Now I have a great deal of sympathy with the proponents of the Mokelumne projects; if their bonds have deteriorated in value it is largely on account of misrepresentations made by the City Engineers regarding their project, and owing to the fact that more honest reports favoring them have been suppressed.
>
> "Eugene J. Sullivan is only a unit amongst many interested in this property, and these people, as it now turns out, have not been given a 'dog's chance'. A grave injustice has been done them in the various reports made against their properties, and in the suppression of a report favoring them. We therefore feel that a Commission should be appointed to take evidence in this matter, and that justice should finally be done. The public rely on your committee to see to this. I feel that what I say is right and I shall continue to fight for it."

How then can it be said that the objects for which he was employed by Mr. Wilsey to make the report in question, and the fact that the properties of the Sierra Blue Lakes Water and Power Company were of substantial value, were not relevant in corroboration of the worthy motives and aims which animated the plaintiff and which if true (*and the undisputed evidence showed them to be true*), negative the *intents, objects* and *purposes* stated in the libel.

G. THE COURT DID NOT ERR AS AGAINST MR. HEARST IN ADMITTING IN EVIDENCE COPIES OF THE SAN FRANCISCO EXAMINER OF NOVEMBER 30, AND DECEMBER 1, 1913, STATING THAT THE SPECIAL WASHINGTON EDITION WAS BEING PREPARED AND ISSUED UNDER HIS PERSONAL SUPERVISION AND DIRECTION.

We respectfully submit that counsel for the defendants have admitted themselves "out of Court" so far as this assignment is concerned. At pages 6, 7, 14, and in the argument on this assignment at pages 86 and 87, of their brief they admit that the evidence is sufficient to sustain the verdict against both defendants. Since the statements in the papers in question concerning Mr. Hearst's connection with the special Washington edition can only be regarded as cumulative evidence going to the admitted fact, there could be no prejudicial error involved here.

We will, however, state briefly the evidence which, in our judgment, caused defendants to omit their motion for a directed verdict in favor of Mr. Hearst and which prevents them from urging here any assignment that there is no evidence to sustain the verdict as to him.

The paper containing the libel, the Court will notice, carried a *fac-simile* reproduction of a letter of the Vice-President of the United States on the front page setting forth his position in respect to the pending bill before the Senate; and it also carried what purports to be signed interviews with a number of Senators and Congressmen indicating that they were in favor of San Francisco's application for the Hetch Hetchy Valley. The plaintiff directly solicited the testimony of some of these gen-

tlemen upon the fact as to whether or not Mr. Hearst had obtained these interviews personally, and Mr. Marshall, manifesting those fine qualities which characterize particularly an Indiana lawyer, was considerate enough to waive his privilege and give his deposition *de bene esse.* In his deposition he testified that he had furnished his written statement to Mr. John Temple Graves, at the latter's solicitation, and that "he had been informed and believed that in some way Mr. John Temple Graves is connected with the news enterprises of Mr. Hearst" (Trans. p. 308).

The plaintiff also called as a witness Mr. J. S. Dunnigan, Clerk of the Board of Supervisors of San Francisco, who stated that he knew Mr. Graves, that he was in Washington at the time of the publication of the special Washington edition of the San Francisco Examiner, and that he was working *in the Hearst office at the time the paper was published.* Now obviously in the face of such testimony the only way counsel could have exculpated Mr. Hearst would have been *to show that Mr. Graves was in the employ* of the defendant printing company. *This they did not offer to do.*

H. THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE COPIES OF AFFIDAVITS SHOWING THAT MR. HEARST WAS THE OWNER OF MORE THAN ONE PER CENT OF THE STOCK OF THE SAN FRANCISCO EXAMINER, THE LOS ANGELES EXAMINER, THE ATLANTA GEORGIAN, THE CHICAGO EVENING AMERICAN, THE BOSTON AMERICAN AND THE NEW YORK EVENING JOURNAL.

When Mr. Marshall testified that John Temple

Graves was connected with the "news enterprises of Mr. Hearst"; and Mr. Dunnigan testified that Mr. Graves "was working in the Hearst office in Washington at the time the paper was published", the affidavits became relevant to identify and make definite Mr. Hearst's news enterprises and his connection with the publication of the libel through his personal agent Mr. Graves. As aptly stated in this connection by the trial judge, "a party is never put to the proof of his whole case by one witness".

These affidavits were also properly admissible to show the large scope of the defendant Hearst newspaper enterprises as bearing both upon a proper characterization of the special *"broad sheet"* published in Washington, the significance attaching to its circulation by Mr. Hearst, and the ability of Mr. Hearst to respond to damages in an amount proportionate to the gravity of the libel.

Evidence of the wealth of the defendant is always admissible in libel cases where punitive damages are demanded as was the case here.

Newell on Slander & Libel (3rd ed.), Sec. 1035, p. 1054;
Barclay v. Copeland, 74 Cal. 1;
Hayner v. Cowden, 27 Ohio St., 292;
Bennet v. Hyde, 6 Conn. 24;
Buckley v. Knapp, 48 Mo. 153;
Hosley v. Brooks, 20 Ill. 115;
Humphries v. Parker, 53 Me. 502;

Karney v. Paiseley, 13 Iowa 89;
Adcock v. Marsh, 30 N. C. 360;
Lewis v. Chapman, 19 Barb. 252.

We trust that we have shown the sufficient relevancy of this and other testimony which has variously been assigned as error, in support of the issues of malice and exemplary damages. Under none of these assignments may the defendants urge that the error was prejudicial, for the reason *that the verdict was for compensatory damages only.* The verdict in this case was not large taking into consideration the nature of the libel and the circumstances surrounding its publication. Another matter of prime consideration is the fact, shown by the recitals in the judgment, *that the defendants allowed the cause to go to the jury without argument on their part.* We respectfully represent that their action in this matter should weigh strongly against them in the consideration given by this Court to their assignments of error.

Throughout the trial in the Court below and here we have consistently tried to bear in mind the great dignity of this form of action in the economy of Anglo-American law. The English speaking people throughout the world have no greater cause for gratification than that their present state of civilized development is based upon their idea concerning the proper functions of government, which leaves no room for the intrusion of the power of the State in behalf of a regulation of relations between the individual and the State involving his

personal rights. We have no forms of action by the State relating to private rights. We are essentially *a self controlled people.* It is the genius of our institutions that our citizens, in the protection of their private rights, will ultimately cleanse and purify governmental policies, and check encroachments of arbitrary official action upon private rights, in private actions, moved thereto by their spirit of freedom and their love for democratic government.

In England today there is no form of action more commonly resorted to, than the action of libel. It was cause for gratification to read a few days ago press accounts of an action brought by an American gentleman in London who had been falsely charged with being a spy and divulging important information obtained while recently visiting the English army in France, and that General French appeared as a witness in his behalf; the case being settled out of Court immediately following the introduction of the latter's testimony.

We respectfully submit to the Court the examination of the whole record in this cause, firmly believing that it will find no prejudicial error therein warranting a reversal of the verdict and judgment.

Dated, San Francisco,
March 18, 1916.

JACOB M. BLAKE,
Attorney for Defendant in Error.

No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

GARRET W. McENERNEY,
Attorney for Plaintiffs in Error.

JOHN J. BARRETT,
ANDREW F. BURKE,
Of Counsel.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

I.

THIS COURT IS BOUND BY THE DECISION IN DAVIS v. HEARST, 160 CAL. 141, HOLDING THAT PROOF OF GOOD REPUTATION OF A PLAINTIFF IN A LIBEL ACTION IS NOT ADMISSIBLE IN ADVANCE OF AN ATTACK.

1. It must be presumed by this court that the Supreme Court of California, in deciding *Davis v. Hearst,* had in mind Section 2053 of the Code of Civil Procedure of California, and that that statute entered into the decision of the case, although not mentioned in the opinion.

This court will presume that the Supreme Court of California has a knowledge of legal principles and of

the statutes of California quite apart from those called to its attention by parties litigant.

See *Cross v. Allen* (1891), 191 U. S. 528, 538 (cited Br. of Plffs. in Error, p. 43);

In re Floyd & Hayes (1915), 225 Fed. 262 (cited Br. of Plffs. in Error, p. 44).

2. If *Davis v. Hearst* be considered merely as the decision of the Supreme Court of California with reference to the admissibility of evidence in that state quite apart from any statute rule upon the subject, it is, nevertheless, binding upon this court.

In *Stewart v. Morris* (1898), 89 Fed. 290, it is said (p. 291):

> "That the federal courts sitting in a state will follow the decisions of the highest courts of the state concerning the rules of evidence has been more than once explicitly affirmed by the supreme court. In Ex parte Fisk, 113 U. S. 113, 5 Sup. Ct. 724, after quoting section 914 of the Revised Statutes, that court said: 'In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the states prevail in those courts.' This is quoted and reaffirmed in Bucher v. Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, where, after stating other respects in which the local decisions, '*whether founded on statute or not,*' are treated as the law of the state by the federal courts, the court says: '*The principle also applies to the rules of evidence.*'"

In *Nashua Savings Bank v. Anglo-American L. M. & A. Co.* (1902), 189 U. S. 221, 47 L. ed. 782, it is said (p. 228):

> "The 'laws of the several states' with respect to evidence within the meaning of this section (Revised

Statutes, Sec. 721), apply, not only to the statutes but *to the decisions of their highest courts.*''

See also:

Bucher v. Cheshire R. Co. (1887), 125 U. S. 555, 582; 31 L. ed. 795, 798;

Ex parte Fisk (1884), 113 U. S. 713, 720; 28 L. ed. 1117, 1120.

In *Gormley v. Clark* (1889), 134 U. S. 338, 33 L. ed. 909, the court, speaking of the binding effect upon decisions of the state court, says (p. 348):

> ''* * * this is so where a course of those decisions, *whether founded on statutes or not,* have become rules of property within the state; *also in regard to rules of evidence in actions at law.*''

II.

THE DECISION IN DAVIS v. HEARST QUITE APART FROM ITS BINDING EFFECT UPON THIS COURT, IS "SUPPORTED BY A PRACTICAL UNANIMITY OF AUTHORITY".

1. The statement in *Davis v. Hearst* that the rule forbidding proof of plaintiff's good reputation in a libel action in advance of an attempt, is ''supported by a practical unanimity of authority'', is justified by the cases and the texts.

See:

5 Am. & Eng. Enc'y of Law (2nd ed.), 852;

18 Am. & Eng. Enc'y of Law (2nd ed.), 1102;

Newell on Slander and Libel (2nd ed.), 771.

ENGLAND:

Cornwall v. Richardson (1825), 1 Ryan & Moody 305. Action for libel. Evidence offered on the part of the plaintiff to prove "general good character of the plaintiff for honesty" was excluded. Lord Chief Justice Abbott held that such evidence was not admissible, and further, that "it made no difference whatever as to the admissibility of such evidence that there was a special justification."

UNITED STATES:

Wright v. Schroeder, 2 Curtis 548; 30 Fed. Cas. 692. Action for libel. In the opinion it is said:

> "The better rule is that the plaintiff must rest on the presumption of good character which the law makes, *until* EVIDENCE *touching it is offered by the defendant.*"

CALIFORNIA:

Davis v. Hearst, 160 Cal. 143. In this case two witnesses of the plaintiff over a *general objection* of the defendant, were allowed to testify that the plaintiff bore a good reputation for honesty and integrity in the community in which he lived. The libel on which the complaint was based charged the plaintiff with being a "grafter". The defendant appealed from the judgment, and for the admission of the evidence as for other reasons disclosed by the opinion the judgment was reversed. With respect to the reception of the evidence of good reputation the court said (p. 185):

> "The court allowed evidence upon the hearing of plaintiff's case in chief to the effect that he bore a good reputation. That affirmative evidence of good reputation in advance of any attack upon it by defendant is inadmis-

> sible, is supported by a practical unanimity of authority. * * * There is nothing in our decisions to lend support to the contrary view. * * * The rule of all the authorities is that the good reputation of the plaintiff is assumed, and that he can, and must, rest upon this until his reputation is attacked."

ILLINOIS:

Golden v. Gartleman (1911), 159 Ill. App. 338. Suit for alienation of affection. Evidence of defendant's good reputation was admitted over objection. Subsequently the evidence was stricken out and error was assigned to the ruling of the court striking out the evidence. The Court of Appeals, in affirming the judgment, said (p. 339):

> "Here the plaintiff offered no evidence tending to show that the character of the defendant for chastity was bad. In *civil cases where character is in issue,* the weight of authority is that evidence of good character should not be received *unless the reputation has been attacked by* GENERAL EVIDENCE *of bad character.*"

INDIANA:

McCabe v. Platter (1843), 6 Blackf. Reports 405. Action for slander. In the opinion it is said:

> "Had the general issue alone been pleaded the evidence would have been clearly inadmissible; and we are of the opinion that the mere fact that there is a plea of justification ought not to make any difference. We consider the law to be that the plaintiff in a case like the present cannot give evidence in support of his character *until the defendant has attempted* BY EVIDENCE *to impeach it.*"

Miles v. Vanhorn (1861), 17 Ind. 245. Action for slander. The pleas were (a) general denial, and (b) justification. From a judgment in favor of the plaintiff

the defendant appealed. *The judgment was reversed* upon the ground that the court had received evidence of the plaintiff's good reputation in advance of an attack. The court said (p. 249):

> "In civil cases the general rule is that evidence in support of the character of either party is inadmissible *until there has been an attempt by evidence to impeach it.*"

Iowa:

Mayo v. Sample (1865), 18 Iowa 306. Action for slander. The court excluded evidence of good reputation of the plaintiff and from a judgment in favor of the defendant the plaintiff appealed. The judgment was affirmed.

Michigan:

Hitchcock v. Moore (1888), 70 Mich. 112; 37 N. W. 914. Action for slander. During the cross-examination of the plaintiff he was asked certain specific questions with reference to his conduct. He thereupon called a witness to prove that his reputation was good. The evidence was excluded and from a judgment in favor of the defendant the plaintiff appealed. The judgment was affirmed, the appellate court holding that the evidence was properly excluded.

Kovacs v. Mayoras (1913), 175 Mich. 582; 141 N. W. 662. Action for libel. Judgment was rendered in favor of the plaintiff. The defendant appealed and the judgment was reversed, one of the grounds for the reversal being the reception of evidence of the plaintiff's good reputation in the absence of an attack thereon by the defendant.

Missouri:

Kennedy v. Holladay (1887), 25 Mo. App. 503. Action for malicious prosecution. The defendant appealed from a judgment in favor of the plaintiff. The judgment was reversed for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack thereon by the defendant.

New Hampshire:

Severance v. Hilton (1851), 24 N. H. 147. Action for slander. Judgment was rendered in favor of the defendant. The plaintiff appealed, alleging that the court committed error in refusing to admit evidence of the good reputation of the plaintiff. The judgment was affirmed, the court saying (p. 148):

> "Where the defendant has not attacked the plaintiff's general character *in evidence,* the plaintiff cannot introduce proof of his good character to rebut a justification, nor to rebut the plaintiff's proof that the words laid in the declaration were spoken by the defendant."

New York:

Shipman v. Burrows (1829), 1 Hall. 399. Action for slander. A new trial was granted the defendant for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack upon it. This is one of the leading cases upon the subject.

Houghtaling v. Kilderhouse (1848), 1 N. Y. 531. Action for slander. The pleas were (a) not guilty, and (b) justification. On the trial the defendant gave circumstantial evidence tending to show that the charge was true. Thereupon the plaintiff offered to introduce evidence to prove "that his general character was good".

This was objected to by the defendant and excluded. After judgment in favor of the defendant, plaintiff moved for a new trial, alleging error in the exclusion of the evidence. The Supreme Court denied a new trial and from the judgment plaintiff appealed to the Court of Appeals, where it was held without opinion that the evidence had been properly excluded.

OHIO:

Blakeslee v. Hughes (1893), 50 Ohio St. 490; 34 N. E. 793. Action for libel. The defense was justification. On the trial the court, over the defendant's objection, permitted the plaintiff to give in chief to the jury evidence of his good reputation. The Circuit Court, *solely on account of this ruling,* reversed the judgment and remanded the cause for a new trial. Held, on appeal to the Supreme Court, that the Circuit Court was right in reversing the case.

In the opinion it is said:

> "Contention is also made that, as the law only presumes an average character, the plaintiff should be permitted to establish, if he can, a character superior to that, in order to enhance the amount of his recovery. Claim is further made that the defendant in this class of cases is not injured by the plaintiff introducing evidence of his good character in chief, because it only tends to establish what the law would presume in the absence of the objectionable evidence. The force of this latter contention would be greatly increased if the evidence of good character actually introduced tended to establish a character of the same degree of excellence that the law would presume if no evidence should be given, and if it could be certainly known that the plaintiff's good character was no more forcibly presented to the minds of the jury by the favorable opinions of his neighbors, delivered

> under oath in their presence, than it would have been by a silent presumption of law. At best, the contention that the plaintiff in that class of actions should be allowed to establish by evidence a character superior to that presumed by law cannot be harmonized with the other claim, that there is no error in allowing it to go to the jury, because it only establishes what the law presumes. Without entering into any discussion of the principles involved in this question, we think the rule forbidding the introduction of such evidence in chief has prevailed in this state from an early period in its judicial history. The rule is plain, and of easy application, works no substantial injustice, and no sufficient reason has been adduced to justify its being overturned."

OREGON:

Cooper v. Phipps (1893), 24 Ore. 357; 33 Pac. 985. Action for libel. Judgment in favor of the plaintiff. The defendants appealed and judgment was reversed, on the ground that the trial court had erred in receiving evidence of the good character of the plaintiff previous to an attack thereon.

PENNSYLVANIA:

Chubb v. Gsell (1859), 34 Pa. 114. Action for slander. A judgment in favor of the plaintiff was reversed for the *sole* reason that the trial court had admitted evidence of the plaintiff's good reputation in advance of an attack by the defendant. In the opinion it is said:

> (p. 115) "In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good but the defendant may traverse this presumption. *Such a traverse is presented when the defendant offers* EVIDENCE *to show that it is bad.* But until then, a plaintiff is not at liberty to adduce evidence to show that his

character is good; for until it has been attacked, the law *presumes, and the defendant admits,* such to be the fact. Until then, the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England, and in our sister states. * * * It is, therefore, only *where evidence has been given directly attacking the character of the plaintiff,* that he is at liberty to introduce proof of his good reputation. * * * Reason, and the authorities generally, unite in excluding such evidence, except where the defendant, by an attack upon it, has rebutted the presumption which the law raises in favor of a good reputation."

WASHINGTON:

Hall v. Elgin Dairy Co (1896), 15 Wash. 542; 46 Pac. 1049. Action for libel. The defendants pleaded justification. Judgment in favor of the defendant. The plaintiff appealed. The judgment was reversed for the reason, among others, that the court had improperly admitted evidence of the plaintiff's good reputation in advance of an attack.

2. *The jurisdictions admitting evidence of plaintiff's good reputation in advance of an attack, so far as can be ascertained, are limited to* North Carolina, South Carolina, Kentucky, Virginia Massachusetts and Connecticut.

See

5 Am. & Eng. Enc'y of Law (2nd ed.), 852,

where the jurisdictions for and against the rule are enumerated.

See also

8 Enc'y of Evidence 274, 275,

for the same purpose.

The cases in these jurisdictions, *six in number,* do not in anywise militate against the position of Mr. Justice Henshaw, that the contrary doctrine for which we contend is "supported by a practical unanimity of authority."

3. The cases of *Press Publishing Co. v. McDonald,* 63 Fed. 238, and *Morning Journal Ass'n v. Duke,* 128 Fed. 657, relied upon by defendant in error, are inapplicable.

Both of the cases just cited hold merely that the *social standing* of the plaintiff is admissible. It was because of the rule stated in these and similar cases that the plaintiff was permitted *without objection* to introduce evidence of his technical education and attainments and the various engineering projects with which he had been connected. This gave to the jury his engineering standing. It is quite another matter, however, to prove general good reputation. The distinction between the two is drawn in *Davis v. Hearst,* supra, where *Turner v. Hearst,* 115 Cal. 394, was distinguished, Mr. Justice Henshaw saying with respect thereto:

> "In Turner v. Hearst, 115 Cal. 394 (47 Pac. 129), no question of reputation was involved, nor was any evidence addressed to it. The court merely declared that in estimating general compensatory damages, the jury was entitled to know 'plaintiff's position and standing in society, and the nature and extent of his professional practice.' "

III.

EVEN THOUGH THERE WERE ANY INCONSISTENCY BETWEEN TURNER v. HEARST AND DAVIS v. HEARST (WHICH THERE IS NOT) THIS COURT WOULD BE BOUND TO FOLLOW THE LATTER BECAUSE IT IS THE LATEST PRONOUNCEMENT OF THE SUPREME COURT OF CALIFORNIA.

In *Leffingwell v. Warren* (1862), 2 Black. 599, it is said:

> "If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute and reverses its former decisions, *this court will follow the latest settled adjudication.*"

To the same effect see

Wade v. Travis Co. (1898), 174 U. S. 499.

To the same effect, see

Sioux Remedy Co. v. Cope (1914), 235 U. S. 197, 201; 59 L. ed. 193.

In re Floyd & Hayes (1915), 225 Fed. 262, it is said (p. 265):

> "It is the duty of the federal court to follow the latest decision of the state court although it may differ from prior decisions of the latter tribunal."

1. The cases relied upon by the defendant in error to the contrary of the proposition just discussed, are inapplicable.

(a) The case of *Burgess v. Segilman* (1882), 107 U. S. 20, is authority for the proposition that where there is *no* decision of the state specifically dealing with a proposition of law, the federal court may decide the question for itself. This case is followed by *Kuhn v.*

Fairmont Coal Co., 215 U. S. 349, also cited by defendant in error.

(b) *Gelpcke v. Dubuque,* 1 Wall. 175; *Ohio Life Ins. Co. v. Debolt,* 16 How. 416; and *Havemeyer v. Iowa Co.,* 3 Wall. 303, lay down the rule that where there is an inconsistency in the decisions of the state court the federal court is at liberty to follow either one. These cases, however, do not represent the general rule as shown by the cases upon which we rely, but rather an exception to that rule. They represent the rule that where contracts are made or bonds are issued in reliance upon decisions of a state court, a federal court in construing such contracts or bonds will follow the earlier decisions rather than the later decisions overruling them. The general rule, however, is that the latest pronouncement of the state court is controlling upon the federal court and finds expression in the dissenting opinion of Miller, judge, in *Gelpcke v. Dubuque,* supra.

IV.

THE DECISION OF THE SUPREME COURT IN CALIFORNIA IN DAVIS v. HEARST, WHETHER CONSIDERED AS THE CONSTRUCTION OF A STATE STATUTE OR AS A RULE OF EVIDENCE QUITE APART FROM STATUTE BEING BINDING UPON THE FEDERAL COURT, SO ALSO IS THE HOLDING THAT THE RECEPTION OF EVIDENCE OF GOOD REPUTATION IS REVERSIBLE ERROR.

The decision in *Davis v. Hearst* in holding that the reception of evidence of the plaintiff's good reputation was *reversible* error is as binding upon this court as

the rule there announced that the reception of such evidence is erroneous. The holding of a state court with respect to the consequences of the violation of a state statute with respect to a matter of evidence is as binding upon the federal court as is the construction of the statute itself. The same rule must necessarily apply even though *Davis v. Hearst* be not considered as a decision dealing with the construction of a state statute, but merely a decision on a matter of evidence quite apart from statute.

V.

THE EVIDENCE OF THE PLAINTIFF'S GOOD REPUTATION WAS NOT ADDRESSED TO HIS PROFESSIONAL STANDING. EVEN WERE IT SO ADDRESSED, HOWEVER, IT WOULD HAVE BEEN INADMISSIBLE.

1. The evidence dealt only with a personal qualification of the plaintiff.

See

Brief of Plaintiffs in Error, p. 52.

2. Even though the evidence of plaintiff's good reputation went to his standing in his profession it would, nevertheless, be inadmissible.

The rule that excludes evidence of reputation with respect to a *personal* qualification also extends to proof of reputation of a *professional qualification.*

See *Burkhart v. North American Co.,* 214 Pa. 39; 63 Atl. 410; and *Howland v. Blake Mfg. Co.,* 156 Mass. 543; 31 N. E. 656, cited in Brief of Plaintiffs in Error, pp. 61, 62.

VI.

THE GENERAL OBJECTION TO THE EVIDENCE OF PLAINTIFF'S GOOD REPUTATION WAS SUFFICIENT FOUNDATION FOR A VALID EXCEPTION.

1. The rule that a general objection is insufficient has limitations as well defined as the rule itself. The rule does not apply unless the general objection masked a secret objection which if made *might have been obviated by the other side.*

In *Noonan v. Caledonia Gold Mining Co.* (1886), 121 U. S. 393; 30 L. ed. 1061, the court, speaking through Mr. Justice Field announced the rule and the limitation with respect to a claim that a general objection was insufficient. The court said (p. 1063):

> "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made it is unavailing on appeal *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. *Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to* GIVE THE OTHER SIDE FULL OPPORTUNITY TO OBVIATE THEM AT THE TIME, *if under any circumstances that can be done.*"

The court in the foregoing matter was dealing with a general objection to the introduction of articles of incorporation. The specific objection which was veiled in the general objection was that the articles were not sufficiently authenticated. Speaking of the objection the court said:

> "Had it been taken at the trial and deemed tenable it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation."

See, also

Nightingale v. Scannell (1861), 18 Cal. 315;
Brumley v. Flint (1891), 87 Cal. 471;
People v. Gordon (1893), 99 Cal. 227;
Swan v. Thompson (1899), 124 Cal. 193;
Arnold v. Producers' Fruit Co. (1900), 128 Cal. 637;
Morehouse v. Morehouse (1903), 140 Cal. 88.

In *Roche v. Llewellyn Iron Works Co.* (1903), 140 Cal. 563, it is said (p. 577):

> "It is urged that the general objection of 'incompetency, immateriality, and irrelevancy' was not sufficiently specific, and several decisions of this court are cited in support of this claim. These cases, however, go only to the extent of holding that under this objection, a party cannot upon appeal urge an objection which is merely formal or special, and which, if it had been pointed out when the evidence was offered, might have been obviated. (See Colton L. and W. Co. v. Swartz, 99 Cal. 278.) Where the offered evidence is inadmissible for any purpose the general objection is sufficient."

See also

Short v. Frink (1907), 151 Cal. 83.

In *Hayne on New Trial and Appeal,* the author, after discussing the rule that an objection should be specific, goes on to say, in paragraph 105, pages 513 et seq.:

> "But it is not to be inferred from the language of the above-quoted decisions that a general objection is in no case of any validity. *The reason of the rule that objections must be specific is that the party might have obviated them had his attention been called to them at the trial. If the objection could not have been obviated, it is evident that the reason of the rule does not apply, and the reason ceasing, the rule itself ceases.*" (Citing numerous cases.)

2. The evidence of plaintiff's good reputation was inadmissible for any purpose and the defect could not have been obviated in any manner.

Nothing that the plaintiff could have done could have made evidence of plaintiff's good reputation admissible, therefore, a general objection was sufficient.

See cases cited supra.

(a) An amendment to the complaint could not, as suggested upon the argument, have made evidence of plaintiff's good reputation admissible.

Two propositions are made in our brief: (1) that *under the pleadings* the plaintiff was not entitled to prove damage *in his profession;* (2) that in no event was he entitled to prove evidence of *good reputation,* professionally or personal.

An amendment of the complaint might have brought within the issues in the action a claim of damage to the plaintiff *in his profession* and made admissible evidence of damage to the plaintiff's profession. It would not, however, have made evidence of the plaintiff's *professional* REPUTATION admissible. In an action for a libel directed at the plaintiff personally he is entitled to prove *personal damages* but is not entitled to prove *good personal reputation.* So, likewise, even though the libel be aimed at the plaintiff in a *professional* capacity the plaintiff while having the right to prove damages to his profession is not entitled to prove *good professional reputation.*

See cases cited under Point V, supra.

(3) In *Davis v. Hearst* it was argued by the respondent that a general objection was insufficient to invoke the rule that evidence of good reputation was not admissible in a libel action in advance of an attack. The court having by necessary implication held that the objection was sufficient, when it held that the evidence was inadmissible, such holding is binding upon this court.

The question of the sufficiency of a *general* objection was fully briefed and argued in *Davis v. Hearst.* The court held that the evidence was inadmissible, thereby by necessary implication holding that the objection was sufficient. We submit that the holding in *Davis v. Hearst* that a *general* objection is sufficient to invoke the protection of a rule of evidence is as binding upon this court as is the rule of evidence itself announced in *Davis v. Hearst.*

VII.

CONCLUSION.

For the reasons above set forth as well as for the many reasons contained in our brief, we submit that the judgment should be reversed.

Dated, San Francisco,
March 22, 1916.

GARRET W. MCENERNEY,
Attorney for Plaintiffs in Error.

JOHN J. BARRETT,
ANDREW F. BURKE,
Of Counsel.

No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,
Plaintiffs in Error,

vs.

TAGGART ASTON,
Defendant in Error.

REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

JACOB M. BLAKE,
Attorney for Defendant in Error.

Filed this.....day of March, 1916

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

Section 2053 of the Code of Civil Procedure of California is as follows:

> "Evidence of good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such person or witness has been impeached, or unless the issue involves his character."

To merely state the statute in its terms would seem to be all that is necessary to rebut the presumption that the Supreme Court of California had it in mind in deciding Davis v. Hearst. Any

such presumption, however, has been directly rebutted on the trial of this appeal. Counsel for the plaintiffs in error have squarely met the challenge set forth in our brief when they admitted on the oral argument that the question of the construction of the foregoing section was not presented in any form to the Supreme Court.

Such an admission is binding upon the parties in this Court.

Pitcairn v. Phillip Hiss Co., 113 Fed. 492.

It is only necessary to refer to the opening brief of the plaintiffs in error and note how strongly they insist upon the rule laid down in authorities, drawn from every possible quarter, which would seem to point to a different rule than that set forth in section 2053, to determine how justly the Court below held that their objection to the admission of the testimony in question was too general to support an exception. The very vigor with which they urge that this Court must presume an intention on the part of the Supreme Court of California to construe the statute in Davis v. Hearst, is a confession, in our judgment, that the rule laid down in that case is in the teeth of the statute: and a necessary corollary to this statement is that if any presumption is to be raised, it is one of invited error on the part of the plaintiffs in error where, under the facts as they appear here, no specific objection was made which would call the attention of the Court and of counsel for the plaintiff below to an alleged error upon the admission of testimony

which could and would be met be a reference to the statute itself.

We have two answers to make to the new points raised in the latest brief of counsel.

A GENERAL OBJECTION IS NEVER GOOD IF THE TESTIMONY COMPLAINED OF IS ADMISSIBLE FOR ANY CONCEIVABLY VALID PURPOSE.

If testimony of a particular kind is admissible for any purpose, it cannot be ruled out on a general objection that it is immaterial, incompetent or irrelevant, without pointing out the specific vice.

Burton v. Driggs, 20 Wall. 125-134.

Here the defendant objected to a copy of an instrument on the ground that it was not an original, and the Court held that, in view of the universal rule allowing proof by copy, the plaintiff was entitled to make the proof in the absence of a specific objection that the copy was not authentic or that there was a lack of the proper foundation.

If under any view of the facts and the pleadings in the case at bar, evidence of the good reputation of the plaintiff was admissible, we respectfully submit that the exception to the evidence in question cannot be urged here under a general objection. We pointed out in our former brief that Sutherland on Damages accords with the view that evidence of good character is admissible in all cases where malice is laid with the object of obtaining exemplary damages. Newell on Slander and Libel (3rd ed.,

Sec. 1036), after stating the strict rule laid down by the line of authorities cited by the plaintiff in error from states not having statutes declaring the contrary rule, as in California, says:

> "But such evidence is admissible under special circumstances to show the libel was false to the knowledge of the defendant and must, therefore, have been written maliciously."

We urge this as justifying the admission of the evidence in question under the rule contended for by counsel. We still urge, however, that such testimony is always admissible upon the general issue by virtue of section 2053, C. C. P. And finally we most strenuously urge that

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THE ASSIGNMENT OF ERROR IS NOT PROPERLY BEFORE THE COURT UPON A SUFFICIENT EXCEPTION.

We take the following from 3 Corpus Juris, p. 746, sec. 639:

> "When an objection is made, the trial Court and opposing counsel are entitled to know the ground on which it is based, so that the Court can make its ruling understandingly and so that the objection can be obviated if possible; and therefore as a general rule, objections, whether made by motion or otherwise, * * * to the evidence, * * * must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient."

And at page 892, sec. 800, it is stated that,

> "Only the grounds of an objection urged in the trial Court will be considered on appeal."

The rule has been uniform in Federal Courts that a general objection to a question as "immaterial, incompetent and irrelevant" is insufficient to sustain an assignment of error.

Minchen v. Hart, 72 Fed. 294;
Eli Mining Co. v. Carleton, 108 Fed. 24;
Davidson Steamship Co. v. U. S., 142 Fed. 315;
Shandrew v. Chicago etc. R. Co., 142 Fed. 320.

In the last case Adams, Circuit Judge, says:

> "To object to a question because it is 'immaterial' or 'irrelevant', without specifying why or in what particular, imposes a burdensome duty upon the Court to immediately and carefully scrutinize the pleadings, with a view of ascertaining therefrom whether under any conceivable theory the proposed evidence would be material or relevant; a duty which from the nature of things, the Court can, at the outset of the trial, with difficulty perform. Counsel, on the contrary, from their familiarity with the case, not only understand the issues, but doubtless understand the immediate or remote bearing of any kind of evidence, and can readily advise the Court why or in what respect a given question is immaterial or irrelevant. *These observations apply with equal or greater force to an objection on the ground of incompetency. A witness may be incompetent as such, or the oral evidence of a fact, when some writing exists, may be incompetent evidence. Which of these, or many others that might be specified, is it?* This can readily be answered by counsel. If he makes an objection, either on the ground of immateriality or incompetency, he knows his reasons for so doing, and must, unless it appears from the connection that the question is obviously

> or clearly inadmissible, state them, if he desires to claim error by reason of the Court's action. The reasons for this rule may also be put on broader grounds. Counsel are officers of the Court in quite the same sense as the judge is. Both are engaged in the serious work of administering justice. They should, therefore, work together to that end. Candor and freedom from reserve or disguise should equally characterize their conduct." (The italics are ours.)

Certainly it cannot be said by counsel for the plaintiffs in error that there are not competing analogies between the rule as they claim it is laid down in Davis v. Hearst and the rule laid down by section 2053, C. C. P., and that the occasion to determine incompetency of the testimony in the one case or the competency of it in the other did not create a condition for the trial Court such as Judge Adams declares should not be allowed to occur.

The general rule we have just stated has never been modified except in so far as the demands of justice have required, and we respectfully represent that no case has been made here by the plaintiffs in error for a departure from the rule.

Dated, San Francisco,
March 25, 1916.

Respectfully submitted,

JACOB M. BLAKE,
Attorney for Defendant in Error.


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